91-112

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David J. Gallo
Counsel of Record

5910 North Central, Suite 1150
Dallas, Texas 75206
(214) 891-6628

QUESTIONS PRESENTED

1. Whether the Wright Amendment, which, *inter alia,* prohibits airlines from permitting passengers to travel between Love Field Airport in Dallas, Texas ("Love Field") and points beyond the borders of certain enumerated states ("Restricted Borders") without such passengers, (1) changing aircraft at some intermediate airport located between the Restricted Borders and Love Field ("Intermediate Airport"), (2) claiming their luggage at such Intermediate Airport and then rechecking it to their final destination, and (3) purchasing two separate tickets (which may not be sold at a discounted total price), impermissibly abridges fundamental rights of interstate travel.

2. Whether the Wright Amendment, which, *inter alia,* forbids airlines and travel agents from, (1) advertising indirect service between Love Field and points which lie beyond the Restricted Borders, (2) publishing materials designed to facilitate connections at Intermediate Airports by those who travel between Love Field and points which lie beyond the Restricted Borders, or (3) stating as a single sum the cost of transportation between Love Field and points which lie beyond the Restricted Borders, impermissibly abridges freedom of speech.

3. Whether the Wright Amendment, which, *inter alia,* requires that passenger aircraft traveling between Love Field and points which lie beyond the Restricted Borders land at an Intermediate Airport between Love Field and the Restricted Borders prior to completing their journeys, violates the Port Preference Clause.

PARTIES TO THE PROCEEDINGS

The petitioner is Buddy Cramer.

The respondents are Samuel K. Skinner, as Secretary of Transportation; the United States Department of Transportation; John V. Coleman, as Director of the Office of Aviation Analysis; the Office of Aviation Analysis; the United States of America; Safe Airspace for Everyone; David L. Zacharias; Russell J. Jewert; Kenneth G. Korges; Rudolph S. Longoria; and Joyce C. Lockley.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	10
I. INTERSTATE TRAVEL	10
II. RESTRICTIONS UPON SPEECH	14
A. Level of Scrutiny	15
B. The Court of Appeals has Failed to Apply the Doctrine of *Central Hudson*, *Posadas*, and *Board of Trustees*	17
1. Substantial Interest Criterion	18
2. Direct Advancement Criterion	19
3. Reasonable Fit Criterion	21
III. PORT PREFERENCE CLAUSE	22
A. Preferential Regulation Sub-clause	23
B. Enter or Clear Sub-clause	24
CONCLUSION	29
APPENDIX A	1a
APPENDIX B	36a
APPENDIX C	38a
APPENDIX D	62a

TABLE OF AUTHORITIES

Cases:

Alabama Great Southern R.R. v. United States, 340 U.S. 216 (1951) 24,25

Cases—Continued: Page

Armour Packing Company v. United States, 209 U.S. 56 (1908) 24

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 11,12,13,20

Austin v. New Hampshire, 420 U.S. 656 (1975) 11

Bigelow v. Virginia, 421 U.S. 809 (1975) 15,17

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) 15,17,18,19,21,22

Califano v. Aznavorian, 439 U.S. 170 (1978) 11,12

Carey, etc., et al., v. *Population Services International*, et al., 431 U.S. 678 (1977) 15-17

Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) 8,15,17-19,21,22

City of Houston v. Federal Aviation Administration, 679 F.2d 1184 (5th Cir. 1982) 25-27

City of Milwaukee, et al. v. *Block*, et al., 823 F.2d 1158 (7th Cir. 1987) 26

City of Milwaukee, et al. v. *Yeutter*, et al., 877 F.2d 540 (7th Cir. 1989), *certiorari denied*, — U.S. —— [110 S.Ct. 500; No. 89-409] (1989) 25,26,28

Continental Air Lines, Inc. v. Department of Transportation, 269 U.S.App.D.C. 116; 843 F.2d 1444 (D.C. Cir. 1988) 1

Crandall v. Nevada, 6 Wallace 35 (1867) 10,12

Dunn v. Blumenstein, 405 U.S. 330 (1972) 11,12

Griffin v. Breckenridge, 403 U.S. 88 (1971) 11,12

Haig v. Agee, 453 U.S. 280 (1981) 11

Jones v. Helms, 452 U.S. 412 (1981) 11,14

Louisiana Public Service Commission, et al. v. *Texas & New Orleans R.R.*, 284 U.S. 125 (1931) 24,25

Cases—Continued: Page

Memorial Hospital, et al. *v. Maricopa County*, et al., 415 U.S. 250 (1974) 13

Passenger Cases, 7 Howard 283 (1849) 10

Paul v. Virginia, 8 Wallace 168 (1869) 10,12

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) 15,17-19,21

Shapiro v. Thompson, 394 U.S. 618 (1969) 7,11-14

State of Nevada, et al. v. *Watkins*, 914 F.2d 1545 (9th Cir. 1990), *certiorari denied*, — U.S. —— [111 S.Ct. 1105; No. 90-992] (1991) 26

State of Pennsylvania v. Wheeling and Belmont Bridge Co., et al., 18 Howard 421 (1856) 22,24,27

State of South Carolina v. State of Georgia, et al., 3 Otto 4 (1876) 24

Twining v. New Jersey, 211 U.S. 78 (1908) 11,12

United States v. Guest, 383 U.S. 745 (1966) 11,12

United States v. Ptasynski, et al., 462 U.S. 74 (1983) ... 26

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 15

Ward v. Maryland, 12 Wallace 418 (1871) 10,12

Zobel v. Williams, 457 U.S. 55 (1982) 8,11,12,14

Constitutional provisions:

Article I, Section 9, Clause 6 ("Port Preference Clause") ..... 7,8,10,22 *et seq.*

Article IV, Section 2, Clause 1 ("Privileges and Immunities Clause") 7,8,10,14

Amendment V, Clause 3 ("Fifth Amendment Due Process Clause") 13

Statutes:

Title 28, U.S.C., Section 1254(1) 1

Statutes—Continued: Page

Title 28, U.S.C., Section 1331 7

Title 28, U.S.C., Section 1346(a)(2) 7

Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978) 2

International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980) 2

Section 29 of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980) (a/k/a the "Wright Amendment") ... *passim*

Other authority

Order 85-12-81 of the United States Department of Transportation (the "DOT Order") ..... *passim*

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Buddy Cramer ("Cramer") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 931 F.2d 1020. The opinion of the district court (App., *infra*, 62a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered May 9, 1991. (No petition for rehearing was filed in the court of appeals.) The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980), are reproduced at App. B., *infra*, 36a-37a.

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980) (hereinafter the "Wright Amendment") is a "provision of a distinctly parochial, domestic nature ... designed to except Love Field [Airport in Dallas, Texas] from the liberalized entry provisions of the Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978) ... The reason for the exception was ... to protect [Dallas/Fort Worth International Airport] from competition at Love Field." *Continental Air Lines, Inc. v. Department of Transportation*, 269 U.S.App.D.C. 116; 843 F.2d 1444, 1446 (D.C. Cir. 1988). (Starr, J.)[1] The Wright Amendment protects Dallas/Fort Worth International Airport from competition by restricting passenger service to and from Love Field, Texas (hereinafter "Love Field") through a variety of mechanisms, each of which is intended to burden those who elect to use Love Field in the course of their interstate travels. These mechanisms may be classified as (1) actual

---

1 In *Continental Air Lines*, the District of Columbia Circuit denied petitions for review of DOT's Order 85-12-81 (hereinafter the "DOT Order"), which interprets the Wright Amendment. The DOT Order is reproduced at App. C, *infra*, 38a-61a.

barriers to interstate movement, (2) economic disincentives, and (3) proscriptions against speech.

The Wright Amendment restricts passenger service to and from Love Field and points which do not lie within certain enumerated states (*i.e.*, Louisiana, Arkansas, Oklahoma, New Mexico, or Texas).[2] Thus the unrestricted service area prescribed by the Wright Amendment is defined by the interstate borders which constitute the outer perimeter of the Enumerated States. (Such interstate borders are hereinafter referred to as the "Restricted Borders".)

The Wright Amendment erects actual barriers to interstate movement by prohibiting air carriers from providing "through service" for travel between Love Field and points which lie beyond the Restricted Borders. (DOT Order, at App., *infra*, 57a.)[3] Thus, under the Wright Amendment's regime, an airline passenger who elects to originate his or her interstate travel at Love Field (or an airline passenger who elects Love Field as the destination of his or her

---

2 Louisiana, Arkansas, Oklahoma, New Mexico, and Texas may be hereinafter referred to individually or collectively as "Enumerated States". States which are not privileged to be among the Enumerated States may be hereinafter referred to individually or collectively as "Unenumerated States".

3 The phrase, "through service" refers to the provision of transportation between an ultimate origin and an ultimate destination on a single ticket for a single sum fare. "Through service" includes both single flight service with one or more stops, and provision of service by connection between two flights. (DOT Order, at App., *infra*, 55a.)

interstate travel) may not traverse the Restricted Borders by remaining on a single aircraft. (DOT Order, at App., *infra*, 57a.)[4] For example, a Love Field Passenger bound from Chicago, Illinois to Love Field must disembark the aircraft upon which she departed Chicago at some point within the Restricted Borders other than Love Field. This requirement is met by the use of intermediate airports within the Restricted Borders (hereinafter "Intermediate Airports"). In the example of a Love Field Passenger traveling from Chicago to Love Field, the airport at Tulsa, Oklahoma might be employed as the Intermediate Airport. In such case, when the aircraft lands at the Intermediate Airport (*i.e.*, Tulsa) as required by the Wright Amendment, all passengers must disembark; they may not reboard the same aircraft to continue their travel to Love Field. The same aircraft is open, however, to any and all other persons who desire to travel from the Intermediate Airport (here, Tulsa) to Love Field.

After they are compelled to disembark aircraft at an Intermediate Airport, Love Field Passengers are permitted to continue their interstate travels on *another* aircraft, via the "most efficient connecting flight". (DOT Order, at App., *infra*, 54a.) However, the Wright Amendment imposes heavy burdens upon those who elect to do so. The Wright Amendment compels air carriers to deny certain public

---

4 Airline passengers who elect to originate their interstate travel at Love Field, or who elect Love Field as the destination of their interstate travel, are hereinafter referred to as "Love Field Passengers."

accommodations (*e.g.*, baggage handling and transfer) to such Love Field Passengers. (DOT Order, at App., *infra*, 56a.) By requiring Love Field Passengers to claim and recheck their baggage at an Intermediate Airport, the Wright Amendment operates to ensure that, in many cases, the "most efficient connecting flight" is a later flight than would have been available to the Love Field Passenger, if her or his baggage had been handled in the ordinary (*i.e.*, unrestricted) manner. If, as in many cases, the plane to which a Love Field Passenger would have connected via an ordinary (*i.e.*, unrestricted) connection departs from an Intermediate Airport within the time required for claiming and rechecking baggage, the Love Field Passenger may in practice be delayed for hours before the next plane bound for the Love Field Passenger's destination leaves the Intermediate Airport. Thus, the Wright Amendment operates to impose a *de facto* detention period upon Love Field Passengers at Intermediate Airports.

The Wright Amendment prohibits air carriers from selling single tickets for restricted travel between Love Field and points beyond the Restricted Borders. (DOT Order, at App., *infra*, 55a, 57a.) Thus, Love Field Passengers must purchase a combination of tickets: one for travel between Love Field and an Intermediate Airport, and one for travel between the Intermediate Airport and the Love Field Passenger's destination beyond the Restricted Borders.[5]

---

5 The sale of such a combination of tickets is referred to as "double ticketing". (DOT Order, at App., *infra*, 54a.)

The Wright Amendment prohibits air carriers from granting through fares for travel between Love Field and any point beyond the Restricted Borders. (DOT Order, at App., *infra*, 58a.) Through fares are "usually lower" than the total fare which would be charged for "double-ticketed" service to a given destination. (DOT Order, at App., *infra*, 55a, n.8.) Thus, the Wright Amendment ensures that the cost of Wright Amendment-restricted double-ticketed travel across the Restricted Borders is higher than it would be in the absence of the Wright Amendment.

The Wright Amendment prohibits air carriers from "offer[ing] for sale transportation to or from ... any point which is outside any [Enumerated] State." (App, *infra*, 37a.) This "ban on advertising" prohibits air carriers *and even travel agents* from "advertis[ing], promot[ing], or otherwise affirmatively solicit[ing] double-ticketing passengers." (DOT Order, at App., *infra*, 56a, 57a, 59a.) Accordingly, the Wright Amendment prohibits air carriers and travel agents from disseminating truthful, "[u]nsolicited information furnished to the public in any form ..." which might facilitate travel between Love Field and points beyond the Restricted Borders. (DOT Order, at App., *infra*, 58a, 59a.) The Wright Amendment further prohibits the mere "*publication* of connecting flight schedules [for double-ticketed service] in airline guides, flight schedules or similar media." (DOT Order, at App., *infra*, 57a. Emphasis added.) Further, the mere act of "stat[ing] as a single amount" the total cost of service between Love Field and points beyond the Restricted Borders would constitute an attribute of through service, and is therefore prohibited by the

Wright Amendment. (DOT Order, at App., *infra*, 55a and note 8.)

2. In this case, Cramer challenges the constitutionality of the Wright Amendment.[6] Specifically, Cramer contends, (1) that the Wright Amendment impermissibly abridges his fundamental right of interstate travel, (2) that the Wright Amendment impermissibly abridges his First Amendment right to receive protected speech, and (3) that the Wright Amendment is repugnant to the Port Preference Clause.

Cramer contends, *inter alia*, that the Wright Amendment impermissibly abridges his fundamental right of interstate travel by burdening his exercise of such right in a manner repugnant to the Due Process Clause of the Fifth Amendment, the Privileges and Immunities Clause of Article IV, and the Assembly Clause of the First Amendment. In brief, Cramer contends that the Wright Amendment's classification of persons at Intermediate Airports as either Love Field Passengers (who are not free to board any flight) and non-Love Field Passengers (who are free to board any flight) constitutes discrimination so unjustifiable as to be violative of due process. See *Shapiro v. Thompson*, *infra*. Cramer further contends that the Wright Amendment's burdens on interstate travel contravene the guarantee of free ingress and egress

---

6 The district court's jurisdiction was invoked under Title 28, U.S.C., Sections 1331 and 1346(a)(2). Cramer seeks a declaration that the Wright Amendment is unconstitutional, an injunction against enforcement thereof, and recovery of damages in the sum of $100.

which is implied from the Privileges and Immunities Clause of Article IV (see *ex rel., Zobel v. Williams, infra*), and that such guarantee should be held to immunize against interference by the National Government (as well as against interference by the governments of the several states).

Cramer contends, *inter alia,* that the Wright Amendment's content regulation of protected speech fails to satisfy any prong of the three-part test approved by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, infra.* Alternatively, Cramer contends that regulation of commercial speech whose purpose is to propose a commercial transaction essential to the exercise of a fundamental right (here, interstate travel) should be subjected to a level of scrutiny higher than that to which content regulation of ordinary commercial speech is subjected under *Central Hudson.*

Cramer contends, *inter alia,* that the Wright Amendment contravenes the Port Preference Clause by requiring that passenger aircraft bound from Love Field to points beyond the Restricted Borders enter a port within an Enumerated State prior to traversing the Restricted Borders, and by requiring that passenger aircraft bound from points beyond the Restricted Borders to Love Field enter a port within an Enumerated State prior to entering the port at Love Field.

The National Government[7] responded to Cramer's complaint in the district court by filing an omnibus

---

7 Respondents, Samuel K. Skinner, United States Department

motion to dismiss for lack of standing, or for summary judgment. Cramer filed a cross-motion for summary judgment. The district court dismissed Cramer's complaint for lack of standing, whereupon Cramer perfected an appeal.

3. The court of appeals held that Cramer had standing to challenge the Wright Amendment, and vacated the district court's order dismissing Cramer's complaint. (App., *infra*, 20a, 35a.) On the merits, the court of appeals held that the district court "did not err ... by not granting Cramer's cross-motion for summary judgment." (App., *infra*, 34a.) The court of appeals remanded this case,[8] declining to rule upon the National Government's motion for summary judgment on the ground that "the Government did not cross-appeal from the district court's jurisdictional dismissal." (App., *infra*, 35a.)

In holding that the district court "did not err ... by not granting Cramer's cross-motion for summary judgment," the court of appeals found the Wright Amendment's restrictions on interstate travel to be "[m]inor restrictions ... [which] do not amount to the denial of a fundamental right that can be upheld only if the Government has a compelling justification."

---

of Transportation, John V. Coleman, Office of Aviation Analysis, and the United States of America, may be hereinafter referred to collectively as the "National Government."

8 Cramer will seek a stay of proceedings in the district court or will perfect an appeal, as may become necessary to preclude possible application of the doctrine of mootness during the pendency of proceedings in this Court.

(App., *infra*, 25a.) The court of appeals further held that the Wright Amendment does not offend the Port Preference Clause because the detriment caused by the Wright Amendment to the ports of the Unenumerated States (and to Love Field) occurs "(i) as an incident to some otherwise legitimate government act regulating commerce [and] (ii) more as a result of the accident of geography than from intentional government preference." (App., *infra*, 27a.) The court of appeals further held that the Wright Amendment's content regulation of speech, (1) serves a "substantial interest in resolving [a] dispute between Dallas and Fort Worth ...", (2) "directly advance[s]" such interest, and (3) is "no more extensive than necessary to serve the Government's interest." (App., *infra*, 32a, 33a, 34a.)

REASONS FOR GRANTING THE PETITION

I. *INTERSTATE TRAVEL*

This Court has long held that the right to travel interstate is constitutionally protected. See *e.g.*, *Passenger Cases*, 7 Howard 283, 492 (1849) (Taney, J., dissenting) ("[C]itizens of the United States ... must have the right to pass and repass through every part of it without interruption ..."); *Crandall v. Nevada*, 6 Wallace 35, 47 (1867) ("[T]he right of passing through a State by a citizen of the United States is one guaranteed to him by the Constitution ..."); *Paul v. Virginia*, 8 Wallace 168, 180 (1869) ("... the citizens of each State [have] ... the right of free ingress into other States, and egress from them ..."); *Ward v. Maryland*, 12 Wallace 418, 430 (1871) (Article IV, § 2 "... secures

and protects the right of a citizen of one state to pass into any other state of the Union for [any lawful] purpose ..."); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) ("[A]mong the rights and privileges of national citizenship recognized by this Court are the right to pass freely from state to state."); *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966) ("[T]he constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel [interstate] ..."); *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) ("... the right of interstate travel is constitutionally protected ..."). See also *Dunn v. Blumenstein*, 405 U.S. 330 (1972); *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Jones v. Helms*, 452 U.S. 412 (1981); *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

This Court has declared that the right to travel interstate is "fundamental". *Attorney General of New York, supra*, at 906 n.6; see also *Jones, supra*, at 418; *United States v. Guest, supra*, at 757; *Shapiro, supra*, at 638. The right to travel interstate is "basic". *Attorney General of New York*, at 901-902 (quoting *Dunn, supra*, at 338, quoting *United States v. Guest*, at 758). The right to interstate travel is an "*unconditional* personal right." *Dunn*, at 341, quoting *Shapiro*, at 643 (Stewart, J., concurring). (Emphasis supplied by the Court in *Dunn*.) "The constitutional right of interstate travel is virtually unqualified." *Haig v. Agee*, 453 U.S. 280, 307

(1981), quoting *Califano, supra,* at 176, quoting *United States v. Guest,* at 757-758.

This Court has held that the right to travel includes both the right of ingress to and egress from the states, and the right to migrate. Decisions of this Court involving the right of ingress and egress include, *inter alia, Crandall, Paul, Ward, Twining, United States v. Guest,* and *Griffin, supra.* Decisions of this Court involving the right to migrate include, *inter alia, Shapiro, Dunn, Zobel,* and *Attorney General of New York, supra.*

This Court's decisions in the right to migrate cases have principally involved state laws which have imposed only indirect burdens upon the exercise of the right to migrate, through classification of residents according to duration of residency. *Attorney General of New York, supra,* at 903. Where such laws have survived rational basis scrutiny, this Court has applied equal protection analysis, and has "... required the States to come forward with a compelling justification." *Id.,* at 904. Cramer has found only one such case involving a federal statute. In that case, *Shapiro, supra,* this Court applied an analysis under the Fifth Amendment similar to that applied to state laws under the Equal Protection Clause, and required that the federal statute be justified by a compelling interest. *Shapiro,* at 642. See also *Id.,* at 644: a statute which "impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true [when] the impinging law [is] ... a federal regulatory clause, to be tested against the Due

Process Clause of the ... Fifth Amendment." (Stewart, J., concurring.)

In the case at bar, Cramer seeks compelling interest scrutiny of the Wright Amendment, under *Shapiro*. The Wright Amendment classifies persons at Intermediate Airports as either Love Field Passengers or non-Love Field Passengers. Outbound Love Field Passengers are not permitted to board certain flights which shall traverse the Restricted Borders, while all others are free to board such flights. Inbound Love Field Passengers are not permitted to board certain flights bound for Love Field solely by reason of their having recently traversed the Restricted Borders, while all others are free to board such flights.

In determining that the Wright Amendment does not impermissibly abridge interstate travel rights, the court of appeals failed to require the National Government to come forward with a compelling justification for the Wright Amendment. Instead the court of appeals relied upon *Attorney General of New York, supra,* at 903, for the proposition that, "[m]inor restrictions on travel simply do not ... [require] compelling justification." App., *infra,* 25a. Cramer submits that the view adopted by the court of appeals finds no support in the opinion of the Court in *Attorney General of New York,* but instead finds support only in a dissenting opinion rendered in that case. See *Attorney General of New York,* at 921 (O'Connor, J., dissenting). ("This Court in *Memorial Hospital* [*v. Maricopa County,* 415 U.S. 250, 256-259 (1974)] acknowledged that *Shapiro* left unclear the amount of impact on the right to travel which is necessary to give rise to application of heightened

scrutiny ... [I]t is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied.") The court of appeals also relied upon the opinion of this Court in *Jones, supra.* App., *infra,* 26a, n.10. Cramer submits that *Jones* is wholly inapposite because in that case it was the appellee's "*criminal conduct* ... [which] qualified his right thereafter freely to travel interstate." *Jones,* at 421. (Emphasis added.)

Cramer has found no opinion of this Court which expressly prescribes the level of scrutiny to be applied to a federal law which burdens the right of ingress and egress. If *Shapiro* controls, the court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court; if *Shapiro* does not control, this case presents an important question of federal law which has not been, but should be, settled by this Court.[9]

II. *RESTRICTIONS UPON SPEECH*

As noted above, the Wright Amendment prohibits publication by airlines and travel agents of, *inter alia,* advertisements and connecting flight schedules respecting otherwise lawful double-ticketed travel between Love Field and points beyond the Restricted Borders.

---

9 This case may also raise the question whether the implied right of ingress and egress derived from the Privileges and Immunities Clause of Article IV (see *Zobel, supra,* at 80 [O'Connor, J., concurring]) provides immunity against interference by the National Government.

A. Level of Scrutiny

The test for identifying commercial speech is whether its purpose is to "propose a commercial transaction." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 473 (1989), quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The court of appeals held that the Wright Amendment restricted commercial speech, and purported to conduct the inquiry prescribed for review of content regulation of ordinary commercial speech in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). App., *infra*, 30a.

This Court has recognized the "crucial distinction" between cases involving content regulation of ordinary commercial speech and those cases in which "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected ..." *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345 (1986). In such cases, this Court has implicitly applied a level of scrutiny higher than that applied in *Central Hudson*, *Posadas*, and *Board of Trustees*. See *Carey*, etc., et al., v. *Population Services International*, et al., 431 U.S. 678, 701 (1977) (noting that the information suppressed by the statute there at issue "related to activity with which, at least in some respects, the State could not interfere." [quoting *Virginia Board of Pharmacists, supra*]). See also *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (noting that the "activity advertised pertained to constitutional interests").

In the case at bar, Cramer seeks to have heightened scrutiny applied to the Wright Amendment's content regulation of protected commercial speech on the ground that such regulation applies *only* to speech which facilitates a constitutionally protected activity (*i.e.*, traversing the Restricted Borders). (Cramer submits that the Wright Amendment is analogous to a statute which prohibits taxi-cab companies from advertising cab rides to the polls on election day, while allowing taxi-cab companies to advertise other services not related to facilitating voting.) In declining to apply heightened scrutiny in the instant case, the court of appeals reasoned:

> "Cramer argues that commercial speech that proposes a transaction that would facilitate the exercise of the right to interstate travel, or any fundamental right, should be afforded protection equivalent to that afforded non-commercial speech. Even assuming that this argument is correct, it is unavailing in these circumstances because we have concluded that the Love Field amendment does not violate Cramer's right to interstate travel."

App., *infra*, 31a, n.16. Cramer submits that the issue of whether the Wright Amendment's restrictions upon interstate movement are constitutional is wholly distinct from the issue of whether the Wright Amendment's content regulation of protected commercial speech should be subjected to heightened scrutiny. (See *Carey, supra*, analyzing restrictions upon distribution of contraceptives

separately from proscription against advertisement of contraceptives.)

Cramer has found no opinion of this Court which expressly prescribes the level of scrutiny to be applied to a federal law regulating the content of commercial speech relating to a constitutionally protected activity. If *Bigelow* and *Carey* control, the court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court; if *Bigelow* and *Carey* do not control, this case presents an important question of federal law which has not been, but should be, settled by this Court.

B. The Court of Appeals has Failed to Apply the Doctrine of Central Hudson, Posadas, and Board of Trustees

This Court has held that the content of ordinary commercial speech

> "may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest."

Posadas, supra, at 340, citing *Central Hudson, supra,* at 566. Assuming, *arguendo,* the *Central Hudson* inquiry is applicable to the Wright Amendment's content regulation of protected commercial speech, the court of appeals failed to conduct such inquiry in a manner consistent with the holdings of this Court.

1. Substantial Interest Criterion

The substantial interest inquiry "involves an assessment of the strength of the government's interest in restricting the speech." *Posadas, supra,* at 341. In the case at bar, the court of appeals found that the Wright Amendment's content regulation of protected commercial speech served a substantial governmental interest of Congress in "resolving [a] dispute between Dallas and Fort Worth"[10] relating to primacy in aviation. App., *infra,* 32a. This Court has previously upheld content regulation of protected commercial speech only where much greater interests of government were served. See *Central Hudson, supra,* at 568, 569. (New York's interests in "fair and efficient" utility rates, and in "energy conservation" each found substantial.) See *Posadas, supra,* at 341. (Puerto Rico's interest in "reduction of demand for casino gambling by [its] residents" held substantial, where such reduction promoted "the health, safety and welfare of [Puerto Rico's] citizens.") See also *Board of Trustees, supra,* at 475. (New York's interests in "promoting an educational rather than commercial atmosphere on [university] campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility" held substantial.) In finding that the National Government has a substantial interest in restricting speech in the case at bar, the court of appeals has interpreted the phrase, "substantial

---

10 Notably, the dispute to which the court of appeals referred was a political dispute between two cities chartered under the laws of the same state.

interest", so broadly as to effectively nullify the substantial interest criterion approved by this Court in *Central Hudson, Board of Trustees* and *Posadas*.

Cramer has found no opinion of this Court which addresses the question of whether or when federal interest in resolving political disputes between cities may qualify as a substantial interest which may justify content regulation of protected commercial speech; Cramer submits that this case presents an important question of federal law which has not been, but should be, settled by this Court.

2. Direct Advancement Criterion

Content regulation of protected commercial speech will not satisfy the direct advancement criterion where "it provides only ineffective or remote support for the government's purpose." *Central Hudson, supra*, at 564. See, *e.g., Id.*, at 569. (While the relationship between New York's interest in fair and efficient utility rates and the advertising ban there at issue was "at most, tenuous," and therefore not sufficiently direct, New York's interest in energy conservation was found to be directly advanced by such advertising ban, because of the "*immediate connection* between advertising and demand for electricity." [Emphasis added.])

In the case at bar, the court of appeals found that the Wright Amendment's content regulation of protected commercial speech

> "directly advance[s] the [National] Government's interest in providing a 'fair and equitable settlement' for the dispute between Dallas and Fort Worth ... by encouraging the

> use of DFW rather than Love Field. It encourages the use of DFW because some travelers may not realize that service beyond the Love Field service area is available from Love Field and by making travel beyond the Love Field service area from Love Field somewhat more difficult[11] even for travelers who realize that such information is available upon request.
>
> "... The Love Field amendment's limitation on advertising reduces the demand for service[12] to points outside the Love Field service area and thus helps to preserve the agreement between Dallas and Fort Worth."

App., *infra*, 32a-33a. Cramer submits that the case at bar is distinguishable from those cases in which this Court found that content regulation of protected commercial speech directly advanced governmental interests by effecting reduction in demand. For example, it is axiomatic that reduction of demand for electricity will directly advance conservation thereof.

---

11 Cramer submits that, if in fact the Wright Amendment renders such travel "somewhat more difficult", then, *a fortiori*, the Wright Amendment deters, impedes or penalizes the exercise of the right to travel interstate. See, *Attorney General of New York, supra*, at 903.

12 Cramer submits that, if in fact the Wright Amendment actually reduces demand for passage across the Restricted Borders, then, *a fortiori*, the Wright Amendment deters, impedes or penalizes the exercise of the right to travel interstate. See, *Attorney General of New York, supra*, at 903.

(*Central Hudson.*) In *Posadas*, "reduction of demand" *was* the government's interest. Cramer submits that reducing demand for lawful interstate travel between Love Field and points beyond the Restricted Borders does not directly advance the asserted interest of the National Government in resolving a political dispute between Dallas and Fort Worth. Any support for the resolution of a political dispute which may result from the Wright Amendment's content regulation of protected commercial speech is at best, "ineffective" and "remote".

In concluding that the Wright Amendment's content regulation of protected commercial speech directly advances the asserted interest of the National Government, the court of appeals has decided a federal question in a manner which conflicts with the decisions of this Court in *Central Hudson, Posadas* and *Board of Trustees.*

3. Reasonable Fit Criterion

In *Board of Trustees*, this Court held that content regulation of protected commercial speech is "no more extensive than necessary" to serve the governmental interest at issue where there is a reasonable fit between the objective of the legislature which enacted the regulation and the means employed to achieve that objective. *Board of Trustees*, at 480. A "reasonable fit" requires that the regulation at issue "employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Id.*, at 480.

With little discussion, the court of appeals held that the Wright Amendment's content regulation of

protected commercial speech "reasonabl[y] fit" the National Government's asserted interest:

> "Without the ban on advertising, more intrusive restrictions *might* be necessary to carry out Congress' decision to keep service at Love Field from undermining the agreement between Dallas and Fort Worth."

App., *infra*, 34a. (Emphasis added.) The court of appeals did not consider the availability of alternative (and far less intrusive) means of resolving the asserted political dispute, such as limiting the number of operations (*i.e.*, takeoffs and landings) at Love Field.

In concluding that the Wright Amendment's content regulation of protected commercial speech satisfies the final *Central Hudson* criterion, the court of appeals has decided a federal question in a manner which conflicts with applicable decisions of this Court, including, *inter alia*, the decision rendered in *Board of Trustees*.

III. *PORT PREFERENCE CLAUSE*

The Port Preference Clause (Article I, § 9, Clause 6) provides:

> "No Preference shall be given by any Regulation of Commerce or Revenue to Ports of one State over those of another: nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another."

As is apparent from the text of the Port Preference Clause, it is comprised of two sub-clauses, separated by a colon.[13] See *State of Pennsylvania v. Wheeling*

and Belmont Bridge Co., et al., 18 Howard 421, 435 (1856). ("[T]he rights of the States were secured, by the exemption of vessels from the necessity of entering or paying duties in the ports of any State other than that to which they were bound ... *And, also,* by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one State over those of another." [Emphasis added.])

A. Preferential Regulation Sub-clause

Decisions rendered by this Court in cases in which it was argued that a regulation of commerce impermissibly preferred the ports of one state over those of another (*i.e.*, cases implicating the Preferential Regulation Sub-clause) establish the general rule that, in order to contravene the Preferential Regulation Sub-clause of the Port Preference Clause, a regulation of commerce must effect

> "... a direct privilege or preference of the ports of any particular State over those of another ... [Thus, the Port Preference Clause forbids] not discrimination between individual ports within the same or different States, but discrimination between States ..."

---

13 Cramer shall hereinafter refer to the first sub-clause (*i.e.*, "No Preference shall be given by any Regulation of Commerce or Revenue to Ports of one State over those of another ...") as the Preferential Regulation Sub-clause; Cramer shall hereinafter refer to the second sub-clause (*i.e.*, "... nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.") as the Enter or Clear Sub-clause.

State of Pennsylvania v. Wheeling, supra, at 435. See also *Alabama Great Southern R.R. v. United States,* 340 U.S. 216, 229 (1951), quoting *Louisiana Public Service Commission,* et al. v. *Texas & New Orleans R.R.,* 284 U.S. 125, 131 (1931). (The Port Preference Clause "prevent[s] preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports.") This Court has held that the Port Preference Clause does not prohibit acts of Congress which provide a special advantage to the port or ports of one state (*e.g.,* acts authorizing, "improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce"), where such acts "*incidentally* operate to the prejudice of the ports in a neighboring State." *State of Pennsylvania v. Wheeling, supra,* at 433. (Emphasis added.) See also *State of South Carolina v. State of Georgia,* et al., 3 Otto 4, 12-13 (1876). (An act of Congress providing for the improvement of the harbor at Savannah, Georgia by the diversion of water from the northern branch to the southern branch of the Savannah River did not offend the provision, "that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." [*I.e.,* the Preferential Regulation Sub-clause.])

Facially neutral acts of Congress which have disparate effects upon the ports of different states based upon the realities of geography do not offend the Port Preference Clause. See *Armour Packing Company v. United States,* 209 U.S. 56, 80 (1908). (Holding that an act of Congress which confers an advantage upon barge shipping as opposed to rail shipping does not impermissibly prefer states whose

ports have the "natural advantage" of being accessible by inland navigation over those states whose ports are not accessible by inland navigation.) See also *Louisiana Public Service Commission v. Texas & New Orleans R.R., supra,* at 130. (Interstate Commerce Commission regulation prescribing rates for transportation of road surface components which were calculated by adding a prescribed fee for ferry service across the Mississippi River at specified points to prescribed "straight mileage" rates did not contravene the Port Preference Clause.) See also *Alabama Great Southern R.R. v. United States, supra,* at 229. (Interstate Commerce Commission order requiring common rail carriers and common water-barge carriers to establish and charge prescribed joint rail-barge through rates for transportation of certain materials did not impermissibly prefer the port of New Orleans over certain ports of Georgia and Texas, where, "whatever preference there is to New Orleans is the result of geography [*i.e.*, New Orleans is accessible by inland navigation] and not of any action of the [Interstate Commerce] Commission.") See also *City of Milwaukee,* et al. v. *Yeutter,* et al., 877 F.2d 540, 545 (7th Cir. 1989), *certiorari denied,* — U.S. —— [110 S.Ct. 500; No. 89-409] (1989). ("Disparate consequences of neutral rules do not violate the Port Preference Clause.") See also *City of Houston v. Federal Aviation Administration,* 679 F.2d 1184, 1198 (5th Cir. 1982). (1000-mile perimeter rule at Washington National Airport, "which for geographic reasons has an incidental effect on air travel from certain states" did not offend the Port Preference Clause where its disparate effects were an, "accident

of geography, not any deliberate discrimination against ... a named state or states.")

During the first three decades of this Court's forty-year silence on the Port Preference Clause,[14] the lower courts were also virtually silent. See *City of Houston, supra,* at 1196. (Noting that "[d]ecisions interpreting the [Port Preference] [C]lause are ... few and far between ...") During the last decade, however, there has been a relative explosion of Port Preference Clause litigation in the lower courts. See *e.g., City of Houston*; see also *City of Milwaukee,* et al. v. *Block,* et al., 823 F.2d 1158 (7th Cir. 1987) and, *following remand, City of Milwaukee v. Yeutter, supra*; see also *State of Nevada,* et al. v. *Watkins,* 914 F.2d 1545, 1557 (9th Cir. 1990), *certiorari denied,* — U.S. —— [111 S.Ct. 1105; No. 90-992] (1991). During this period, the Fifth Circuit has derived the following rule from the opinions of this Court:

> "[A] statute that results in some detriment to the port of a state does not violate the port preference clause when the detriment occurs '(i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference'."

---

14 Cramer's research has revealed only one reference by this Court to the Port Preference Clause after its October Term, 1950. See *United States v. Ptasynski,* et al., 462 U.S. 74, 80, n.10 (1983) (containing *dictum* to the effect that the Port Preference Clause effects an express, "limitation on the National Government's commerce power").

App., *infra*, 27a, quoting *City of Houston*, at 1197.

Assuming, *arguendo*, that the rule adopted by the Fifth Circuit in *City of Houston* and applied in the case at bar constitutes a correct synthesis of this Court's holdings under the Port Preference Clause, the court of appeals has failed to apply said rule to the Wright Amendment in a manner consistent with the holdings of this Court. First, the Wright Amendment discriminates between *states* by establishing a direct preference for the ports of the Enumerated States over those of the Unenumerated States.[15] Second, the Wright Amendment is not facially neutral, because the Wright Amendment expressly prefers the named, Enumerated States, over the Unenumerated States. Third, the Wright Amendment's detrimental effect upon the ports of the Unenumerated States is not merely "incidental" (as that term was employed in *State of Pennsylvania v. Wheeling, supra*); instead, the Wright Amendment's primary mechanism is to restrict passenger air service to the Unenumerated States. Finally, the Wright Amendment's discrimination against the Unenumerated States is no accident of geography, but a calculated erection of the political frontiers of member states of the United States as actual barriers to interstate travel. (Thus, under the regime of the Wright Amendment, a Love Field Passenger may travel without restriction to such

---

15 While it may also be true that the Wright Amendment prefers the port at Dallas/Fort Worth International Airport over that at Love Field, this additional, lawful, discrimination is not curative of the Wright Amendment's unlawful discrimination in favor of the Enumerated States over the Unenumerated States.

far-away places as El Paso, Texas and Albuquerque, New Mexico, but may not travel freely to nearby Wichita, Kansas or Kansas City, Missouri, simply because these cities lie beyond the Restricted Borders.) Accordingly, the Wright Amendment is repugnant to the Preferential Regulation Sub-clause of the Port Preference Clause.

Because this Court has not considered the Port Preference Clause in forty years, this Court has had no occasion to address the Port Preference Clause in the context of aviation. Cramer believes the application of the Port Preference Clause in the context of aviation presents important questions of federal law which have not been, but should be, settled by this Court. Additionally, Cramer submits that the court of appeals has decided the question of whether the Wright Amendment is repugnant to the Preferential Regulation Sub-clause in a manner which conflicts with the decisions of this Court discussed hereinabove.

B. Enter or Clear Sub-clause

In contrast to the Preferential Regulation Sub-clause (which constitutes only a "general prohibition of preferences" in regulation of commerce or revenue), the Enter or Clear Sub-clause effects an "explicit ban" on obligations to enter or clear a port of a state other than that to which a vessel is bound. *City of Milwaukee v. Yeutter, supra,* at 546. Cramer's research has not revealed any decision of this Court which appears to apply the Enter or Clear Sub-clause. Restated, all decisions of this Court which Cramer has found relating to the Port Preference Clause involved alleged preferences in the regulation of commerce,

and none has involved a statute or regulation which purportedly obligated vessels bound to or from one state to enter the port of another. (In fact, Cramer's research has revealed no prior statute or regulation which has expressly purported to require a vessel to enter a port of one state, prior to entering the state of its destination.)

Cramer believes the Wright Amendment is the first federal statute or regulation to implicate the explicit ban contained in the Enter or Clear Sub-clause. The Wright Amendment contravenes the Enter or Clear Sub-clause by requiring that passenger aircraft bound from Love Field to points beyond the Restricted Borders enter a port within an Enumerated State, before entering a port of an Unenumerated State. (Similarly, the Wright Amendment requires that passenger aircraft bound from a point beyond the Restricted Borders to Love Field enter a port within an Enumerated State, before entering the port at Love Field.) Cramer believes this first impression issue is an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

David J. Gallo
5910 North Central, Suite 1150
Dallas, Texas 75206
(214) 891-6628

July, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1303

BUDDY CRAMER, Plaintiff-Appellant

v.

SAMUEL K. SKINNER as Secretary of Transportation, et al., Defendants-Appellees,

and

SAFE AIRSPACE FOR EVERYONE, et al., Intervening Defendants-Appellees.

MAY 9, 1991

Before GOLDBERG, KING, and DUHE, Circuit Judges.

KING, Circuit Judge:

The plaintiff-appellant Buddy Cramer (Cramer) asserts that the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, § 29, 94 Stat. 35 (1980) (Love Field amendment), which restricts interstate air service from Love Field Airport (Love Field) in Dallas, Texas, abridges his

constitutional rights of free speech and interstate travel. The defendants in this case, the individuals and agencies charged with enforcing the Love Field amendment (the Government), moved the district court for dismissal or, in the alternative, for summary judgment. They alleged that Cramer lacks standing to attack the statute, or that if Cramer has standing, he cannot succeed on the merits. Cramer opposed the Government's motion and filed a cross-motion for summary judgment. The district court granted the Government's motion and entered a take-nothing judgment against Cramer. The district court agreed with the Government that Cramer lacks standing to challenge the Love Field amendment. Because the district court found that the case did not present a justiciable case or controversy, it did not reach the merits of Cramer's claims. We find that Cramer has standing to challenge the Love Field amendment and vacate the district court's judgment based on Cramer's found lack of standing (which must necessarily have been without prejudice). Cramer, however, also appeals from the district court's denial of his cross-motion for summary judgment. We affirm the district court's denial of Cramer's cross- motion for summary judgment on the merits.[1]

---

1 The Government moved the district court to dismiss Cramer's suit, or in the alternative, for summary judgment. The district court did not specify whether it granted the Government's motion to dismiss under Fed.R.Civ.P. 12(b), or if it granted summary judgment under Fed.R.Civ.P. 56. Because the district court may have considered matters outside the pleadings in making its jurisdictional determination, it arguably considered the standing issue on the Government's motion for summary

I. BACKGROUND AND PROCEDURE

Dallas, Texas and Fort Worth, Texas fought long and bitterly over which city should have the principal airport for the two-city metropolitan area. *See City of Dallas, Texas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1019 (N.D.Tex.1973) (rejecting request by cities and regional airport board for declaratory judgment stating that they could exclude Southwest Airlines from operating from Love Field), *aff'd*, 494 F.2d 773, *cert. denied*, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974). Love Field, built by Dallas, competed with Fort Worth's airports. As the district court in *City of Dallas* found, this rivalry "resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities." *Id.* at 1020. In the late 1960s, the two cities settled their dispute by building Dallas-Fort Worth International Airport (DFW). As part of that compromise, the eight airlines then serving the area agreed to move to DFW.

Southwest Airlines (Southwest), which began providing intrastate flights from Love Field in 1971, refused to move to DFW, however, and obtained a judgment that it could not be excluded from using Love Field as long as Love Field remained open. *Id.* For several years thereafter, Southwest operated flights from Love Field to locations within Texas.

---

judgment. Even if the district court considered the standing issue on the Government's motion for summary judgment, however, it considered only the jurisdictional question and not the merits of Cramer's claims.

Because it operated from Love Field only intrastate, Southwest was exempt from the regulations that governed interstate airline operations under the Federal Aviation Act of 1958, 49 U.S.C.App. § 1301 *et seq.* When Congress deregulated the airlines, however, Southwest obtained authority from the Civil Aeronautics Board (CAB) to operate flights from Love Field to New Orleans. In so doing, CAB rejected the argument of Dallas and Fort Worth and the Dallas-Fort Worth Regional Airport Board that the Airline Deregulation Act of 1978 (Deregulation Act), Pub.L. No. 95-504, 92 Stat. 1705, included a provision specifically intended to bar CAB from authorizing interstate air service at such an airport over the objections of the local airport proprietor.

Congress reacted to CAB's decision by adopting the Love Field amendment as part of legislation further deregulating the airline industry. *See* International Air Transportation Competition Act of 1979, § 29, Pub.L. No. 96-192, 94 Stat. 35, 48-49 (1980). In essence, the Love Field amendment, which applies only to Love Field, prohibits airlines from offering single ticket interstate service from Love Field except to the four states contiguous to Texas (the Love Field service area).

Although this amendment restricts airline services at Love Field, a traveler can obtain unrestricted airline services at DFW, located 18 miles from the center of Dallas and only 12 miles from Love Field. Travelers also can use Love Field to reach points outside the Love Field service area by taking a second flight. Such travelers must buy a separate ticket for each leg of the trip, however, and cannot check their baggage

for the entire journey. The Love Field amendment also prohibits airlines from advertising or volunteering information on service outside the Love Field service area. It does not prohibit an airline, however, from providing such information on request. Southwest continues to provide interstate service at Love Field subject to these statutory restrictions. No other carrier now operates flights to Love Field with large aircraft, although three carriers made attempts.[2]

On April 21, 1989, Cramer filed suit in federal district court, alleging that the Love Field amendment violates his rights to free speech and interstate travel. Cramer's second amended complaint sought a judgment declaring the statute unconstitutional, enjoining the defendants from enforcing the statute, and awarding him $100 as compensatory or nominal damages. The defendants are the United States of America, Samuel K. Skinner in his capacity as Secretary of Transportation, the United States Department of Transportation (DOT), John V. Coleman in his capacity as Director of DOT's Office of Aviation Analysis, and the Office of Aviation Analysis. The individual defendants in their official capacity, DOT, and DOT's Office of Aviation Analysis enforce the Love Field amendment.

---

2 Texas International Airlines made the first such attempt. It began operating interstate service from Love Field in 1980, but subsequently terminated that service. Muse Air next attempted to compete with Southwest at Love Field, but its operations were financially unsuccessful. Southwest later acquired Muse Air and terminated its operations. Finally, Continental Airlines in 1985 announced plans to begin airline operations at Love Field but never began such service.

On June 20, 1989, the Government filed a motion to dismiss the complaint for lack of standing or, in the alternative, for summary judgment. On July 7, 1989, Cramer filed a cross-motion for summary judgment. On April 11, 1990, the district court entered a memorandum order dismissing the complaint because Cramer failed to demonstrate standing to challenge the Love Field amendment. The court held that the Love Field amendment's restrictions on advertising had not injured Cramer because he could obtain information on service beyond the Love Field service area on request. The district court did not question that Cramer's right to interstate travel had been injured, but reasoned that Cramer failed to show that a favorable judgment was likely to redress that injury. Because the district court dismissed Cramer's complaint for lack of standing, it did not rule on the constitutional issues presented by the cross-motions for summary judgment. Cramer filed a timely notice of appeal.

II. ANALYSIS

A. Standing

1. Standard of review

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 757, 70 L.Ed.2d 700 (1982). The Supreme Court has inferred from the case or controversy requirement that a litigant must have

"standing" to maintain an action in federal court. In order for a litigant to establish standing, article III, at a minimum, requires the litigant to show:

> [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant ...
>
> [2] that the injury "fairly can be traced to the challenged action" and
>
> [3] [that the injury] "is likely to be redressed by a favorable decision."

Id. at 472, 102 S.Ct. at 758 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976) (citation omitted); *see also Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). In addition, the Supreme Court has stated that a court should consider three prudential concerns in determining standing. *See Valley Forge Christian College*, 454 U.S. at 471, 102 S.Ct. at 757; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979). Those considerations are:

> 1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue;
>
> 2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches; and

3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.

Saladin v. City of Milledgeville, 812 F.2d 687, 690 (11th Cir.1987) (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College*, 454 U.S. at 474-75, 102 S.Ct. at 759-60; *Gladstone, Realtors*, 441 U.S. at 100, 99 S.Ct. at 1608).

Different standards apply when a litigant challenges standing on a Fed.R.Civ.P. 12(b) motion than on a motion for summary judgment under Fed.R.Civ.P. 56. When a court considers standing on a motion for a Rule 12(b) dismissal, it must accept the allegations in the pleadings as true. *Lujan v. National Wildlife Fed'n*, — U.S. —, 110 S.Ct. 3177, 3184, 111 L.Ed.2d 695 (1990). When the defendant moves for summary judgment because of lack of standing, however, the plaintiff must submit affidavits and comparable evidence that indicate that a genuine issue of fact exists on the standing issue. *Id.* Cramer contends that the district court considered the standing issue on the Government's motion for dismissal under Rule 12(b) and that we should accept the allegations contained in his complaint as true even if not supported by admissible summary judgment evidence. The Government, on the other hand, contends that we should apply the summary judgment standard and consider only Cramer's admissible summary judgment evidence. The record is unclear on whether the district court granted the Government's motion based on Rule 12(b) or Rule 56. Even if we apply the summary judgment standard and

consider only Cramer's admissible summary judgment evidence, however, we conclude that Cramer established standing.[3]

---

3 Although the language in the Government's motion is not entirely clear, the Government appears to ask the district court for a Rule 12(b) dismissal on the basis of standing and for summary judgment on the merits in the alternative. The Government moved the court to dismiss this case or, in the alternative, for summary judgment in their favor, pursuant to Rule 56 of the Federal Rulesof Civil Procedure. The defendants move the Court to dismiss the case for lack of jurisdiction, since there is no case or controversy as required by the Constitution.... If the court does not dismiss the complaint, the defendants will be entitled to a judgment against plaintiff as a matter of law, as there is no issueof material fact.

The district court and both parties to this suit, however, treated the standing issue as before the court on a motion for summary judgment. In its memorandum order, the district court stated that the action was "before it on cross-motions for summary judgment" and concluded that because "Cramer has no standing to challenge the constitutionality of the Love Field amendment, the United States' motion to dismiss or for summary judgment is granted, while Cramer's motion for summary judgment must be denied." The Government also treated the standing issue as before the district court on a motion for summary judgment. In connection with its motion, the Government submitted a statement of material facts as to which no genuine issues existed, and a statement of issues of law. Such a statement is pertinent only to a motion for summary judgment. Many of the facts in the Government's statement, and the first issue of law, concerned Cramer's standing. *See Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 192-95 (5th Cir.1988) (finding that district court dismissed based on summary judgment motion rather than Rule 12(b) because district court considered defendant's statement of undisputed facts). Furthermore, Cramer submitted affidavits to the district court that were relevant both to the merits of his

Cramer asserts three discrete injuries: (1) deprivation of his first amendment right to hear, (2) deprivation of his right of interstate travel, and (3) economic injury. Because an adjudication of the question of standing is not an adjudication on the merits, we must assume that the conduct of which Cramer complains is unconstitutional. *Warth*, 422 U.S. at 502, 95 S.Ct. at 2207 ("We also assume, for [standing] purposes ... that such ... practices, if proved in a proper case, would be adjudged violative of the constitutional ... rights of the persons [affected].").

2. Right to hear

The Love Field amendment prohibits an airline from "offer[ing] for sale" transportation to points outside the Love Field service area. As interpreted by DOT, this prohibition applies not only to airlines but also to travel agents who act as agents for airlines. Cramer asserts that the Love Field amendment's prohibition against air carriers and travel agents volunteering information concerning travel beyond

---

claims and to the standing issue, and the district court did not exclude these affidavits. In fact, in making its standing determination, the district court considered a letter from America West Airlines, attested to by an affidavit by Cramer's attorney, that stated that America West would consider service to Love Field if the Love Field amendment were declared unconstitutional. The district court's admission and consideration of this evidence is significant because Rule 12(c) states that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...."

the Love Field service area violates his first amendment right to hear. The district court held that, because "Cramer knows that he is entitled to such information upon request, he is not being denied any information he would receive if the Love Field amendment were held unconstitutional." The district court did not address, and the Government does not argue, whether Cramer's asserted injury to his first amendment right to hear is fairly traceable to the Love Field amendment, or whether invalidation of the Love Field amendment would redress his asserted injury.

Cramer argues that the district court's holding conflicts with the Supreme Court's decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). In *Virginia State Bd. of Pharmacy,* the Court reasoned that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted [by would-be listeners]." *Id.* at 757, 96 S.Ct. at 1823. The Court reasoned:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Id. at 757 n. 15, 96 S.Ct. at 1823 n. 15.

The Government argues that the passage quoted above states only that would-be listeners have a first

amendment right to receive commercial speech and that they may assert that right despite their ability to receive the information by asking. It does not relieve the plaintiff, the Government argues, from the necessity of demonstrating that he has suffered some actual or threatened injury because of the defendant's conduct. *See Valley Forge Christian College,* 454 U.S. at 472, 102 S.Ct. at 758. In effect, the Government argues that only individuals who do not know that they can request information can show an injury to their right to hear commercial speech because would-be listeners who know to ask for the information have not been injured. We disagree.

The Supreme Court has described the injury requirement for standing as an "injury in fact" that is "distinct and palpable," and not "abstract," "conjectural," or "hypothetical." *See Allen,* 468 U.S. at 751, 104 S.Ct. at 3324. If an individual's statutory or constitutional rights have been violated, and that right is cognizable by the courts, he has suffered an injury. That injury is insufficient to establish standing, however, if it is a generalized grievance common to all members of the public or if the injury is merely abstract. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216-27, 94 S.Ct. 2925, 2929-30, 41 L.Ed.2d 706 (1974) (no standing as taxpayers to challenge whether members of Congress could hold commissions in the Armed Forces Reserve under the incompatibility clause of article I); *United States v. Richardson,* 418 U.S. 166, 175, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (plaintiff did not have standing as taxpayer to argue that legislation that permitted the CIA to withhold from the public detailed information about its expenditures violated

the accounts clause of the Constitution because "his challenge was not addressed to the taxing or spending power, but to the statutes regulating the CIA."). These requirements of an actual injury tend "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College,* 454 U.S. at 472, 102 S.Ct. at 758. In order to demonstrate standing, a plaintiff must allege both a constitutional violation and an identifiable personal injury resulting from that violation. *Id.* at 485, 102 S.Ct. at 765.

Cramer's first amendment claim meets this standard. Although Cramer does not allege a large or intense personal injury, it is not merely an " 'abstract injury in nonobservance of the Constitution asserted by ... citizens.' " *Valley Forge Christian College,* 454 U.S. at 482, 102 S.Ct. at 764 (quoting *Schlesinger,* 418 U.S. at 223 n. 13, 94 S.Ct. at 2933 n. 13). In his affidavit, Cramer states that he travels frequently to states beyond the Love Field service area on regularly scheduled passenger flights. He states that he depends to some extent on airline personnel, travel agents, or publications printed by the airlines to plan his trips. The Love Field amendment, he contends, makes planning his trips more difficult. The Government does not dispute these assertions.

The personal inconvenience that Cramer suffers in planning his trips because of the Love Field amendment may be slight, but it is nonetheless real and nonetheless an injury. The Constitution draws no

distinction between injuries that are large, and those that are comparatively small. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686- 87, 689 n. 14, 93 S.Ct. 2405, 2415-16, 2417 n. 14, 37 L.Ed.2d 254 (1973) ("identifiable trifle" is sufficient injury to establish standing; standing is not "to be denied simply because many people suffer the same injury") (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613); *Saladin*, 812 F.2d at 691 ("There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be."); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C.Cir.1986) (injury "will not suffice if it is too speculative, but it need not be large or intense") (citation omitted).

The critical question for standing is not the extent of the plaintiff's injury, but whether the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions?" *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The injury in fact requirement "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *SCRAP*, 412 U.S. at 689 n. 14, 93 S.Ct. at 2417 n. 14 (1973). Cramer has such a direct stake.

Our resolution of the standing issue might be different if Cramer had not suffered personally the

inconveniences associated with the Love Field amendment's restrictions on commercial speech. His injury, in that case, might well be speculative and hypothetical. Cramer, however, has more than an abstract interest in seeing that the Government observes the Constitution—he is affected by the Love Field amendment's restrictions on speech whenever he plans a trip beyond the Love Field service area. The injury that Cramer asserts places his first amendment issue in a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College,* 454 U.S. at 472, 102 S.Ct. at 758. Furthermore, we believe that the Supreme Court meant what it said when it stated that the right to receive advertising may be asserted by a would-be listener even though the listener could obtain the information simply by asking. *Virginia State Bd. of Pharmacy,* 425 U.S. at 757, 96 S.Ct. at 1823. We conclude, therefore, that Cramer has alleged a sufficient injury to have standing to assert his first amendment claim.[4]

---

4 We also note that the Government's argument appears to put the burden on the wrong shoulders. If the statute is, in fact, unconstitutional, Cramer ought not to have to ask for the information he seeks. Furthermore, the existence of the Love Field amendment may have a chilling effect on the willingness of travel agents to impart information even at Cramer's request, thus impairing his ability to exercise his right to hear.

3. Whether Cramer's injuries are likely to be redressed by a favorable decision of the court

The district court did not hold that Cramer failed to demonstrate an injury to his right to interstate travel, or that any of his asserted injuries were not fairly attributable to the Government's putatively illegal conduct. Rather, it held that Cramer failed to demonstrate that a favorable ruling by the court would redress his alleged injury to his right to interstate travel.[5]

The Supreme Court has articulated the redressability component for standing in various ways. In *Valley Forge Christian College*, the Court inquired whether the asserted injury was " 'likely to be redressed by a favorable decision.' " 454 U.S. at 472, 102 S.Ct. at 758 (quoting, *Simon*, 426 U.S. at 38, 96 S.Ct. at 1924). In *Allen*, the Supreme Court inquired if "the prospect of obtaining relief from the injury as a result of a favorable ruling [was] too speculative?" 468 U.S. at 752, 104 S.Ct. at 3325. And in *Warth*, the Supreme Court stated that the plaintiff "must allege facts from which it reasonably could be inferred that ... there is a substantial probability" that the asserted injury will end "if the court affords the relief requested." 422 U.S. at 504, 95 S.Ct. at 2208. Under any of these formulations of the redressability requirement, the plaintiff need show that only one of his asserted injuries will be redressed by a favorable ruling. *Larson v. Valente*, 456 U.S. 228, 243 n. 15, 102

---

5 The district court did not consider Cramer's alleged economic injury.

S.Ct. 1673, 1682 n. 15, 72 L.Ed.2d 33 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.") (emphasis in original).

Cramer argues that three distinct injuries might be redressed by a favorable ruling: injury to his first amendment rights, injury to his right to interstate travel, and economic injury. Because the district court found that Cramer had not demonstrated an injury in fact to his first amendment rights, it did not address whether that injury might be redressed by a favorable ruling. The district court also did not address whether a favorable ruling would redress Cramer's economic injury. The district court did find, however, that a favorable ruling would not redress Cramer's injury to his right to interstate travel because Cramer had not shown that an airline was willing to relieve the inconveniences caused by the Love Field amendment if the amendment were found unconstitutional.

Cramer need show that only one of his alleged injuries would be redressed by a favorable ruling, and neither the Government nor the district court has argued that a favorable ruling would not redress Cramer's alleged injury to his first amendment rights. That injury would be redressed if, because of a favorable ruling, an air carrier or travel agent advertised, published, or volunteered information concerning service outside the Love Field service area. Cramer satisfied this requirement by supplying the affidavit of a travel agent stating that she would

inform clients concerning connecting flights to locations outside the Love Field service area if the Love Field amendment were invalidated. In fact, in arguing that Cramer's alleged economic injury would not be redressed by a favorable ruling, the Government apparently concedes that a favorable ruling would redress Cramer's alleged first amendment and interstate travel injuries. The Government argues that, although Cramer could not receive damages, "Cramer's [other] alleged injuries ... would be remedied if the court awarded the declaratory and injunctive relief sought by him."

Although we conclude that a favorable ruling would redress the injury to Cramer's first amendment rights, we also conclude that he alleged sufficient facts from which we reasonably can infer that a substantial probability exists that his alleged injury to his right to interstate travel also would be redressed by a decision in his favor. *Warth*, 422 U.S. at 504, 95 S.Ct. at 2208 ("Petitioners must allege facts from which it reasonably could be inferred that ... there is a substantial probability [that the asserted injury would end] if the court affords the relief requested"). Cramer's injury would be redressed if additional carriers commenced service at Love Field[6], if

---

6 Cramer provided a letter from America West stating that America West was "seriously interested in providing service to Love Field [and] ... would promptly consider the institution of service to and from Love Field" were the statute invalidated. Because America West did not firmly commit to beginning service from Love Field, however, the district court concluded that this letter did not demonstrate the likelihood that America West actually would commence service as a result of a favorable

Southwest instituted through fares at Love Field, or if Southwest ceased the inconveniences now mandated by the Love Field amendment, such as requiring passengers to depart from a flight continuing beyond the Love Field service area to the passenger's ultimate destination.

One can reasonably infer that Southwest would sell through tickets to areas outside the Love Field service area were it permitted to do so, just as it does at its other locations. The Government observes that Southwest is the only carrier at Love Field and argues that for this reason Southwest might not wish to offer the lower priced through fares. The Government overlooks, however, that Southwest currently competes with airlines offering service from DFW, just twelve miles away.

Cramer also argues that one can infer from Southwest's consistent practice at other locations that it would not continue to inconvenience passengers from Love Field were it not constrained to do so. At the least, Cramer argues, Southwest would not continue to require a passenger to depart from a

---

ruling. We do not necessarily agree with the district court's interpretation of this letter. America West hardly could be expected to provide an absolute commitment without knowing when, if ever, the amendment would be invalidated, and without knowing the state of America West's, the nation's, or the Dallas/Fort-Worth area's economy at that time. In these circumstances, America West's statements appear reasonably firm. We also note that America West filed an amicus brief in this court stating that it is "actively interested" in providing service from Love Field and does not currently offer such service because of the Love Field amendment.

flight continuing to the passenger's final destination, require the passenger to collect luggage, buy another ticket, and wait at least forty-five minutes before continuing on another flight. The Government argues that such a conclusion is mere speculation. We find such an inference reasonable, however, based on Southwest's self-interest, consistent practice, and common sense.

We conclude that Cramer satisfied the redressability requirement for standing by offering sufficient evidence from which we reasonably can infer the substantial probability that at least one of his alleged injuries would be redressed by a favorable decision. Because the district court did not address, and the Government does not argue, that Cramer's alleged injuries are not fairly traceable to the illegal conduct, we conclude that Cramer has standing to challenge the Love Field amendment.

B. Merits

Because we find that Cramer has standing to challenge the Love Field amendment, and because the parties have fully briefed the merits of this dispute (which does not present any contested issues of material fact), we consider Cramer's appeal from the district court's denial of his cross-motion for summary judgment. Cramer argues that he was entitled to summary judgment because the Love Field amendment abridges his first amendment and interstate travel rights and because the Government has not advanced a governmental interest sufficient to justify these abridgments.

1. Restrictions on Cramer's right to interstate travel

Although no clause in the Constitution specifically provides a right to interstate travel, the Supreme Court has inferred this right from various constitutional provisions and from the structure of the federal system itself. In his interstate travel argument, Cramer relies principally upon the due process clause of the fifth amendment, the privileges and immunities clause of article IV[7], the assembly clause of the first amendment, and the port preference clause of article I. Cramer's argument under each of these clauses is essentially the same. He asserts that the Love Field amendment infringes a fundamental right and that the Government has not advanced a compelling interest to justify the infringement.

---

7 Cramer appears to confuse the privileges and immunities clause of article IV, however, with the privileges and immunities clause of the fourteenth amendment. The privileges and immunities clause article IV states that "[t]he citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, 2, cl. 1. The privileges and immunities clause of article IV merely limits the right of states to exclude citizens of other states from privileges granted to its own citizens. *United States v. Wheeler*, 254 U.S. 281, 41S.Ct. 133, 65 L.Ed. 270 (1920). While we have held that state legislation may violate the privileges and immunities clause of article IV if it unjustifiably denies the right to travel, that clause applies only to state legislation and does not govern federal statutes. *See e.g., Frazier v. Heebe*, 788 F.2d 1049, 1052 (5th Cir.1986), *rev'd on other grounds*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987).

We do not write on an entirely clean slate in determining whether the Love Field amendment impermissibly infringes on Cramer's right to interstate travel. In *City of Houston v. F.A.A.*, 679 F.2d 1184, 1198 (5th Cir.1982), we upheld similar restrictions placed on the use of Washington's National Airport (National). We rejected in that case a challenge to Federal Aviation Administration regulations that prohibited the use of National for non-stop flights to cities more than 1,000 miles from Washington. Under those regulations, a traveler from a location more than 1,000 miles from Washington must stop or change planes in a city less than 1,000 miles, or take a direct flight to Dulles International Airport (Dulles), or Baltimore-Washington International Airport. National, however, is close to the center of Washington, while Dulles is 26 miles west of downtown. *Id.* at 1186, 1187. The plaintiffs in *City of Houston* argued, *inter alia*, that the perimeter rule at issue in that case infringed upon their right to interstate travel and violated the port preference clause. In rejecting their challenge, we reasoned that

> [a]t most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support....

Id. at 1198.[8]

---

8 The Second Circuit upheld a similar perimeter rule in *Western Air Lines, Inc. v. Port Authority*, 817 F.2d 222 (2dCir.1987), *cert. denied*, 485 U.S. 1006, 108 S.Ct. 1467, 99 L.Ed.2d697 (1988).

In his attempt to distinguish *City of Houston,* Cramer seizes upon dictum stating that an attempt "completely to bar travelers from distant cities from flying to National Airport ... might well give rise to a constitutional claim." *Id.* at 1192. Cramer argues that the Love Field amendment represents just such an attempt to bar all travelers from outside the Love Field service area from flying to Love Field. We disagree.

The Love Field amendment does not bar travelers from distant cities from using Love Field. Rather, just as the perimeter rule at issue in *City of Houston,* it makes travel less convenient for such passengers. Love Field remains attractive for many long-distance travelers, apparently including Cramer himself, despite the statutory restrictions.

Cramer also argues that the Love Field amendment is fatally different from the perimeter rule at issue in *City of Houston* because Congress chose to define Love Field's permissible service area by using state borders. The use of state borders to define the permissible service area, he argues, penalizes interstate travel as interstate travel—the precise evil the Constitution prohibits. Cramer cites no authority, however, for the proposition that a Congressional statute regulating commerce may not use state boundaries for definitional purposes, nor can we

---

The rule at issue in that case also required passengers traveling a long distance to use a less convenient airport. The plaintiff, however, did not argue that the rule violated the constitutional right to travel.

discern any reason Congress should be prohibited from using such borders. Cramer, we note, does not allege that the Government had a discriminatory purpose for using such borders. Any geographical limit for air service from Love Field must be somewhat arbitrary, but we reject Cramer's assertion that the use of state borders for definitional purposes violates the Constitution.

In a further attempt to distinguish *City of Houston,* Cramer argues that the Love Field amendment's statutory restrictions, in contrast to the regulations we upheld in *City of Houston,* are irrational because they are unnecessary. He argues that the perimeter rule was needed to protect Dulles because Dulles was underused, but the Love Field amendment is not needed to protect DFW because DFW is a busy airport. We disagree that the Love Field amendment's restrictions are irrational. The Love Field amendment carries out the agreement between Dallas and Fort Worth that ended the competition between those cities for the area's principal airport. The success of DFW illustrates the importance of that agreement. Cramer contends, in effect, that the very success of that agreement, as measured by the traffic at DFW, indicates that the agreement is irrational[9]. We disagree.

---

9 Congress may, in the future, elect to respond to changing conditions at Love Field. That case is not before us, and we do not intimate what our response might be to such a Congressional decision.

As we stated in *City of Houston*, travelers do not have a constitutional right to the most convenient form of travel. *Id.* at 1198. Minor restrictions on travel simply do not amount to the denial of a fundamental right that can be upheld only if the Government has a compelling justification. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 2321, 90 L.Ed.2d 899 (1986) (a state law only implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification that serves to penalize the exercise of the right to travel). Cramer remains free to travel unrestricted to points outside the Love Field service area from Dallas by using DFW, or he can take a second flight from a point within the Love Field service area. The amendment does not deter Cramer from travelling by air, and the statute's history shows that its purpose was not to impede travel but to carry out an agreement thought necessary to benefit the region's travelers by consolidating service at DFW. *See* H.R.Rep. No. 96-716, 96th Cong., 1st Sess. 24, U.S.Code Cong. & Admin.News 1980, pp. 54, 86 (purpose of amendment was to provide "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"). In addition, unlike a residency requirement, the Love Field amendment does not use any classification that penalizes a person's exercise of his or her right to travel. If every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before

an interstate bridge, would raise a constitutional issue.[10]

In *City of Houston*, we also rejected the argument that the perimeter rule violated the port preference clause. The port preference clause provides:

> No Preference shall be given by any Regulation of Commerce or Revenue to Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

---

10 For example, in *Jones v. Helms*, 452 U.S. 412, 101 S.Ct.2434, 69 L.Ed.2d 118 (1981), the Supreme Court upheld a state law that made it a felony if a parent willfully and voluntarily abandons a dependent child and then leaves the state. In rejecting the claim that the statute violates the right to interstate travel, the Supreme Court did not require the state to show a substantial need for the law. The Court reasoned that because the law's restrictions on interstate travel do "not infringe upon appellee's fundamental rights," the state "need not employ the least restrictive, or even the most effective or wisest, means to achieveits legitimate ends." Id. at 425-26, 101 S.Ct. at 2443. Similarly, in *Niles v. University Interscholastic League*, 715 F.2d1027 (5th Cir.1983), *cert. denied*, 465 U.S. 1028, 104 S.Ct. 1289,79 L.Ed.2d 691 (1984), we upheld a school district rule that prevents students from playing on interscholastic athletic teams until the student has been a resident of the district for one year. The student contended that he could not comply with the residency requirement because he had been living with his mother in another state and argued that the rule violated his right to interstate travel. In rejecting his argument, we reasoned that the rule was not a significant infringement on the student's right to travel. *Id.* at 1030-31.

U.S. Const. art. I, § 9, cl. 6. Cramer contends that the Love Field amendment violates the port preference clause because it requires vessels bound from Love Field to enter and pay duties to one of the four states contiguous to Texas before continuing.[11] The Love Field amendment, Cramer argues, results in a detriment to Love Field, a port of Texas, and to the ports of those states not accessible from Love Field.

We stated in *City of Houston* that a statute that results in some detriment to the port of a state does not violate the port preference clause when the detriment occurs "(i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional government preference."[12] *City of Houston*, 679 F.2d at 1197. The Love Field amendment satisfies both tests.

---

11 Cramer notes that passenger aircraft are required to pay landing fees when landing at most airports. He argues that because some of the airports in contiguous states undoubtedly are owned by those states, aircraft are required, in essence, to pay duties to those states.

12 In articulating this rule, we relied upon a line of Supreme Court cases interpreting the port preference clause. In *South Carolina v. Georgia*, 93 U.S. 4, 13, 23 L.Ed. 782 (1876), the Supreme Court held that "the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another." Similarly, in *Alabama Great Southern R.R. Co. v. United States*, 340U.S. 216, 229, 71 S.Ct. 264, 272, 95 L.Ed. 225 (1951), the Supreme Court upheld an Interstate Commerce Commission order that allegedly gave a preference to a New Orleans port over ports in other states on the ground that "whatever preference

Cramer, however, argues that the Love Field amendment's detriment to Love Field is not incident to a legitimate Government act because Congress' sole purpose in enacting the amendment was to restrict interstate travel. We disagree. Congress did not decide to cut back service at Love Field, as Cramer assumes, for no reason. Congress enacted the Love Field amendment incident to its legitimate regulation of interstate airline service and pursuant to its rational decision to maintain the agreement between Dallas and Fort Worth.[13] Furthermore, although Congress used state borders to define the area of unrestricted service, the four states allegedly preferred by the amendment benefit "as a result of an accident of geography." Cramer, in fact, does not suggest that Congress chose those borders for any reason except that they happened to be the states closest to Dallas and Fort Worth.[14]

---

there is to New Orleans is a result of geography and not of any action of the Commission."

13 The Conference Committee stated that the Love Field amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years" and has been agreed to by "Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW Airport authority, and related constituent groups." H.R.Rep. No. 96-716, 96th Cong. 1st Sess. 24 (1979),U.S.Code Cong. & Admin. News 1980, p. 86.

14 The purpose of the Port Preference Clause, as we stated in *City of Houston*, is to give "small states protection against deliberate discrimination against them by other, more powerful states." Id. at 1198. Cramer has not demonstrated that Congress deliberately discriminated against the 45 states not bordering on Texas by requiring travelers from such states to use DFW if they

Cramer also argues that the Love Field amendment violates the assembly clause of the first amendment.[15] He discusses the "freedom riders" of the desegregation movement, and the 1964 march on Washington. He argues that approval of the Love Field amendment could open the door at some future date to a facially neutral statute whose actual purpose is to suppress dissent by inhibiting interstate travel. The Love Field amendment's restraints on interstate travel, he contends, should be considered analogous to restraints on speech; and because the Love Field amendment uses state borders to define the service area, we should treat the Love Field amendment's restrictions on travel as analogous to regulations on the content of speech. Such a regulation, he contends, should be upheld only if the Government asserts a compelling justification. Although a facially neutral restriction on travel intended to inhibit first amendment rights is not beyond the realm of possibility, Cramer does not contend that he has a political motive for his travel or that Congress had an ulterior motive in enacting the Love Field amendment. In these circumstances, Cramer cannot rely on any incidental effects such a restriction may have on his right to free association.

2. First Amendment

Cramer contends that the Love Field amendment's restrictions on speech infringe his first amendment

---

wish to travel to Dallas-Fort Worth on a non-stop or "through" ticket.

15 Cramer, however, cites no precedent for this proposition.

right to receive lawful, truthful commercial information. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 748, 96 S.Ct. at 1819. To evaluate this argument, we first must determine whether the speech at issue is commercial. If so, we must ascertain if it receives first amendment protection. Finally, if the first amendment protects the speech, we must decide if the Love Field amendment's restrictions violate the first amendment.

"Commercial speech" is speech whose purpose is to "propose a commercial transaction." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989). Classification of the speech as commercial does not become inappropriate merely because the speech is mixed with pure speech or touches on matters of public concern. *Id.* The Love Field amendment states that airlines may not offer service from Love Field to points outside the Love Field service area. DOT's interpretation of that provision allows carriers to provide information and sell transportation to points outside the Love Field service area on request from a traveler, but forbids airlines (and travel agents) from advertising or offering to sell such transportation to travelers who do not request it. DOT Order 85-12-81. The purpose of offering or advertising service to points outside the Love Field service area is to propose a commercial transaction. The speech at issue, therefore, meets the Supreme Court's definition of "commercial speech."

Commercial speech receives the protection of the first amendment when it "concern[s] lawful activity and [is] not ... misleading." *Id.*, 109 S.Ct. at 3032

(quoting *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)).[16] The sale of airline tickets is lawful, and the Love Field amendment restricts airlines and travel agents from offering truthful information concerning connecting flights to areas outside the Love Field service area. The speech at issue in this case, we conclude, is truthful and concerns a lawful activity and therefore receives first amendment protection.

The Supreme Court articulated the test for determining whether restrictions on commercial speech violate the first amendment in *Central Hudson. Id.* at 566, 100 S.Ct. at 2351; *see also Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986). Commercial speech may be "restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest."[17]

---

16 Cramer argues that commercial speech that proposes a transaction that would facilitate the exercise of the right to interstate travel, or any fundamental right, should be afforded protection equivalent to that afforded non-commercial speech. Even assuming that this argument is correct, it is unavailing in these circumstances because we have concluded that the Love Field amendment does not violate Cramer's right to interstate travel.

17 The Supreme Court has upheld substantial restrictions on commercial speech under this standard. *See e.g., Posadas*, 478 U.S.328, 106 S.Ct. 2968 (upholding prohibition on advertising gambling casinos to Puerto Rico residents).

Posadas, 478 U.S. at 340, 106 S.Ct. at 2976 (citing *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351).

Under the *Central Hudson* test, we first must determine if the Government has a substantial interest in restricting information concerning travel from Love Field to locations outside the Love Field service area. Cramer contends that the Government has not asserted a substantial interest. We disagree. The purpose of the Love Field amendment, as stated in the Conference Committee report, was to provide "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years" and has been agreed to by "Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW Airport authority, and related constituent groups." H.R.Rep. No. 96-716, 96th Cong. 1st Sess. 24 (1979), U.S.Code Cong. & Admin.News 1980, p. 86. We conclude that Congress had a substantial interest in resolving the dispute between Dallas and Fort Worth, a controversy that had long hindered efforts to improve airline service for the Dallas-Fort Worth area. *See City Of Dallas*, 371 F.Supp. at 1020.[18]

We next must determine whether the Love Field amendment's restrictions on commercial speech directly advance the Government's interest in

---

18 We note that the intervenors in this case argue that the Love Field amendment is a legitimate health and safety regulation. They contend, *inter alia*, that the current regulations work to prevent or minimize engine parts from literally falling from the skies, from creating a class of virtual noise refugees, and from worsening the already serious asthmatic conditions of residents.

providing a "fair and equitable settlement" for the dispute between Dallas and Fort Worth. Dallas and Fort Worth agreed that DFW should be the principal airport for the two-city metropolitan area. The Love Field amendment's restrictions on advertising directly advance that interest by encouraging the use of DFW rather than Love Field. It encourages the use of DFW because some travelers may not realize that service beyond the Love Field service area is available from Love Field and by making travel beyond the Love Field service area from Love Field somewhat more difficult even for travelers who realize that such information is available upon request.[19]

---

19 In *Virginia State Bd. of Pharmacy*, the Supreme Court rejected the argument that restrictions on providing information concerning drug prices was supported by a substantial Government interest in promoting high professional standards among pharmacists. *Virginia State Bd. of Pharmacy*, 425 U.S. at 768, 96S.Ct. at 1829. The Court reasoned that the Board's argument was greatly undermined "by the close regulation to which pharmacists in Virginia are subject," and because the Board's justifications were based on a paternalistic desire to protect the public. *Id.* The Government's interest in enacting the Love Field amendment, however, does not suffer from these infirmities. Although the airline industry is highly regulated, Congress enacted the Love Field amendment to discourage the use of Love Field for long-distance flights and not to promote professional standards in the airline industry or in a paternalistic attempt to protect the public by denying it information.

The most significant distinction between *Virginia State Bd. of Pharmacy*, however, and the instant case is that the regulations atissue in *Virginia State Bd. of Pharmacy* did not directly advancethe Government's asserted interest. The Board's asserted goals of promoting professionalism among pharmacists

The challenged statute also satisfies the last prong of the *Central Hudson* test because the restrictions on commercial speech are no more extensive than necessary to serve the Government's interest. The critical question, as clarified by the Supreme Court's opinion in *Board of Trustees,* is whether a reasonable fit exists between the challenged advertising restrictions and the Government's asserted interest. *Board of Trustees,* 492 U.S. at 473-77, 109 S.Ct. at 3032-35. The Love Field amendment's limitation on advertising reduces the demand for service to points outside the Love Field service area and thus helps to preserve the agreement between Dallas and Fort Worth. Without the ban on advertising, more intrusive restrictions might be necessary to carry out Congress' decision to keep service at Love Field from undermining the agreement between Dallas and Fort Worth. We conclude, therefore, that the Love Field amendment satisfies each prong of the *Central Hudson* test and does not amount to a constitutionally impermissible infringement on Cramer's right to receive lawful, truthful commercial speech. The district court did not err, therefore, by not granting Cramer's cross-motion for summary judgment.

---

and improving the public's health in the *Virginia State Bd. of Pharmacy* could be accomplished as well by informing the public fully so that they could make their own informed choice as to the drugs they wished to purchase. The Government's purpose in enacting the Love Field amendment (implementing the agreement between Dallas and Fort Worth by reducing interstate travel from Love Field) could not be accomplished as easily without the restrictions on advertising.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court erred by dismissing Cramer's suit for lack of standing, but properly denied Cramer's cross-motion for summary judgment. Although the Government has fully briefed the merits of its motion for summary judgment, we cannot order judgment on the merits for the Government because the Government did not cross-appeal from the district court's jurisdictional dismissal. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1924) (party who does not cross-appeal may not seek to enlarge his own rights or lessen those of his adversary); *Ayers v. United States*, 750 F.2d 449 (5th Cir.1985). We therefore vacate and remand with instructions to the district court to consider the Government's motion for summary judgment and for further proceedings consistent with this opinion. Costs shall be borne by Cramer.

VACATED AND REMANDED.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Section 29 of the International Air Transportation Competition Act of 1979, Pub.L. No. 96-192, 94 Stat. 35 (1980).

> Sec. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
>
> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing

service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

APPENDIX C

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

No. 43307

LOVE FIELD AMENDMENT PROCEEDING

Issued by the Department of Transportation
on the 31st day of December, 1985

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[1] Our request for

---

1 The question of proper interpretation of the Love Field Amendment was previously raised in the *Southwest Airlines—Muse Air Acquisition Proceeding*, where the Department found it unnecessary to reach the issue in its decision. Order

comments followed announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985, the Dallas/Fort Worth (DFW) Parties[2] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

In view of the current dispute regarding Love Field service, and because the issue is primarily a question of law, we asked for comments to assist us in interpreting the Amendment. Responders were asked to specifically address the questions of whether an air carrier can serve Love Field on a non-interline basis, if the carrier interlines elsewhere on its system; and whether the Amendment applies to intrastate service. We received comments and reply comments from: Air Midwest, America West Airlines, Continental Air Lines, the Dallas/Fort Worth Parties, Delta Air Lines, the Department of Justice, the Regional Airline Association, Republic Airlines, and Southwest Airlines, Co., and several letters from the general public. In addition to comments concerning statutory interpretation, several parties raised related questions about marketing of Love Field services in a manner consistent with provisions of the Amendment.

85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. *Id.*

2 The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas—Fort Worth International Airport Board.

We have considered all comments and have also taken notice of Orders 80-3-9, 80-5-12, 80-8-181, and 80-12-102 of the Civil Aeronautics Board, the pleadings in *City of Dallas v. CAB*, Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980), and the legislative history of the Amendment in interpreting its meaning.

After careful review of these matters, the Department has decided that: 1) Continental's proposed service between Love Field and Houston, Texas, does not violate the Love Field Amendment; 2) the Amendment does not apply to flights by intrastate carriers or intrastate service by an 'air carrier'; 3) upon the request of passengers, Continental or its agents may sell 'double tickets' to passengers continuing on a different aircraft and flight beyond an authorized destination from Love Field; 4) however, neither Continental nor its agents may list in any manner, including a computer reservation system, a flight from Love Field as a 'connection' to a point beyond the Love Field authorized service area; 5) Delta, or any other airline, may list in its computer reservation system flights from Love Field by a certificated carrier using small aircraft in the same manner as commuter carrier flights; and 6) intrastate and air carriers may provide service between Love Field and other points within the state of Texas so long as they do not use this service to avoid the Love Field Amendment's restrictions on interstate air service.

BACKGROUND

Since the completion of Dallas/Ft. Worth Regional Airport (DFW), which resolved a long-standing rivalry between Dallas and Ft. Worth for interstate service to their communities, the DFW Parties have sought to prohibit interstate service at other area airports. The DFW Parties, in fact, previously asked the CAB to prohibit interstate service at area airports other than DFW, especially Love Field. The CAB refused to do so. The DFW Parties' argument for this prohibition in the years immediately following completion of the regional airport was that interstate operations at Love Field would damage the viability of the new airport. *See* Order 79-9-192 (September 28, 1979).

In addition, the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1705 (1978)) substantially changed the Federal government's regulatory oversight of air transportation. In particular, the Act includes a provision, as part of the listing of public interest elements, concerning the use of satellite airports and the power of regional authorities over their use. Section 102(a)(6), 49 U.S.C. 1302(a)(6). Some members of the House of Representatives apparently believed this provision would prohibit the CAB from authorizing interstate service at Love Field, but the Conference Report on the subsequently passed Love Field Amendment indicates the Senate did not share this view. S. Rep. No. 96-531, 96th Cong., 1st Sess. (1980) [hereafter, Conference Report]. The Deregulation Act also includes provisions, known as the Automatic Market Entry (AME) program, that allowed carriers to enter certain markets prior to

complete route deregulation without a CAB finding that entry was needed. Section 401(d)(7), 49 U.S.C. 1371(d)(7). Under the AME provisions, the CAB ruled that Southwest Airlines could provide interstate service from Love Field, notwithstanding section 102(a)(6). Order 79-9-192 (September 29, 1979).

Congress subsequently addressed the dispute respecting service at Love Field in an amendment to the International Air Transportation Competition Act (IATCA). Congressman Jim Wright initially introduced an amendment to IATCA, passed by the House, that effectively prohibited all interstate air service at Love Field. However, the Senate version of IATCA contained no similar provision. The Conference Committee adopted a compromise solution to settle the controversy, producing the current Love Field Amendment. It rejected Congressman Wright's total ban on interstate air service at Love, but imposed substantial restrictions. Subsection (a) of the Amendment prohibits the CAB or its successor from authorizing interstate service (other than limited charter and commuter flights) to Love Field, except in accordance with remaining provisions of the Amendment. Subsection (b) prohibits interstate scheduled service at Love Field, except in accordance with other provisions of the Amendment, or if such service was operated before November 1979. This section assured that Southwest could continue to operate Love Field service the CAB had previously authorized. Subsection (c) defines the scope of permissible service as follows:

> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with

> the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

Continental does not plan on operating from Love Field beyond the five-state area specified in (c), an action which would be clearly prohibited. Rather, Continental plans to serve Love Field with flights to Houston. Continental has interline agreements with other carriers and provides interline service at its Houston hub. Thus, in interpreting the Amendment, we must interpret the interline prohibition contained in (c)(1) to determine whether the Amendment should be construed to prohibit a carrier that interlines elsewhere on its system from serving Love Field, or whether it should be construed merely to prohibit interlining in connection with service at Love Field.

The Dallas—Ft. Worth Parties and Southwest argue that the Amendment prohibits service at Love

Field by carriers that interline anywhere on their systems, even if no interline service is provided on flights serving Love Field. The Justice Department disagrees, arguing that Congress' intent in enacting the Amendment was to prohibit interlining only in connection with Love Field service. Justice notes that this view is consistent with prior CAB interpretations of section (c)(1).

The CAB's most detailed interpretation of the interline prohibition occurred in connection with an airport notice filed in 1980 by Texas International Airlines (TI) to inaugurate interstate service from Love Field.[3] The airport notice was opposed by Southwest and the DFW Parties on the grounds that the Amendment prohibited Love Field service by interlining carriers, such as TI, even if the carrier did not provide interline service from Love.[4] The CAB disagreed and permitted TI to institute the proposed interstate service, interpreting the Amendment as restricting interlining on flights serving Love Field, rather than as a total prohibition on serving Love Field by carriers that interline elsewhere on their systems. Order 80-8-181 (August 29, 1980).[5] The DFW

---

3 TI was subsequently merged into Continental after its parent, Texas Air Corporation, acquired Continental.

4 Unlike TI, Southwest, which had previously been authorized by the CAB to provide service at Love, did not interline with other carriers elsewhere on its system. Order 79-9-192 (September 29,1979).

5 In addition, the CAB found that the Amendment's restrictions, while statutory and clearly applicable without

Parties sought judicial review of that order *City of Dallas v. CAB,* Case Nos. 80-2064 and 81-1192 (D.C. Cir. 1980). The issue, however, was never resolved, because TI discontinued its Love Field service during the course of the appeal; and the case was dismissed as moot.

Continental's proposed service at Love Field is similar to the earlier service of TI approved by the CAB. The issues and positions of interested parties remain much the same as in TI's 1980 application. After careful review of comments, the plain words of the Amendment, and its legislative history, we have determined that the CAB properly interpreted subsection (c)(1) as only prohibiting interlining on flights serving Love Field. Thus, we find the Amendment does not prevent Continental from providing service between Love Field and Houston.

OPERATIONS BY AN AIR CARRIER WITH INTERLINE SERVICE

The Department interprets the Amendment as not prohibiting non-interline service at Love Field by an air carrier that provides interline service elsewhere on its system. The DFW Parties, Southwest, and Republic, who do not agree with this interpretation, contend that we should first look to the plain wording of the Amendment to ascertain Congressional intent,

---

further regulatory action, should be embodied in certificates authorizing such service, as intended by Congress (Conference Report at 25). Order at 6.

unless the literal wording of the statute would lead to 'unreasonable' or 'incongruous' results. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). We do not disagree.

In examining the wording of the Amendment, it is clear that the critical part of subsection (c) is one sentence regarding service by 'an air carrier' 'on a *flight* between Love Field, Texas,' and points in Texas and the adjacent four states. Subclause (1) prohibits 'such air carrier' from offering or providing through service or ticketing with other carriers; and subclause (2) prohibits the carrier from offering for sale transportation to a point outside the authorized area, and serving such a point on a flight that also serves Love Field. In our view, the plain and literal meaning of subsection (c) refers to a specific 'flight,' and subclauses (1) and (2), which must logically be read together (the clauses are joined by the conjunction 'and'), describe restrictions applicable to the flight. As further discussed below, the legislative history is not contrary to this plain reading; and this reading is not unreasonable. *See, Nat'l Small Shipments Traffic Conference v. CAB*, 618 F.2d 819 (D.C. Cir. 1980).

The DFW Parties and Southwest offer a significantly different reading of the literal words of subsection (c). Their proffered meaning rests on the assumption that subclauses (1) and (2) must be read separately. Under this interpretation, subclause (1) describes a class restriction, prohibiting any carrier that interlines elsewhere on its system from serving Love Field; while subclause (2) describes an operational restriction, prohibiting this class of carrier from serving Love Field beyond Texas and the

four-state area. Thus, the DFW Parties and Southwest contend that subsection (c)(1) is clear in its terms: a carrier that conducts any interlining operations is precluded from offering interstate service at Love. Moreover, under this interpretation, any conflict between subclauses (1) and (2) is illusory; since the DFW Parties and Southwest argue that it is logical to apply subsection (c)(1) universally, while applying (c)(2) only in connection with operations at Love Field.

The Board rejected this reading of subsection (c) as unreasonable, finding that provisions of the Amendment must be read in harmony. Order 80-8-181, at 4 (August 29, 1980). As the CAB stated, to agree with this interpretation of (c)(1) would require a reading of (c)(2) prohibiting an air carrier providing service at Love from providing any service outside Texas and the four adjacent states, even operations unconnected with Love Field service. *Id.*[6] This interpretation would be inconsistent with the statements of the Conference Committee that carriers providing interstate service at Love were not precluded from operating outside the five-state area, as long as through or connecting services to points outside the area were not offered in connection with the carriers' Love Field service. Conference Report at 25-26. It is also inconsistent with the remainder of subsection (c) and the rest of the Amendment, which envisions and regulates interstate service at Love Field. Further, the Conference Report specifically

---

6 While this outcome might be acceptable to the DFW Parties, Southwest would probably object.

states that carriers' usual ticketing, scheduling, and ratemaking practices would not be otherwise affected. *Id.* To read the subclauses separately effectively undercuts the Amendment, suggesting that Congress enacted a self-defeating statute. As the CAB found, Congress intended that carriers providing interline services elsewhere on their systems could provide service at Love Field, as long as they did not provide interline service to points outside the five-state area in connection with their Love Field services. Order 80-8-81 at 5. We agree.

Moreover, our plain reading of the Amendment is supported by a customary understanding of English grammar. To support their interpretation, the DFW Parties and Southwest would have us change the conjunction between the subclauses from 'and' to 'or,' in order to read the clauses separately. However, the clauses are joined together in one sentence as connected restrictions on permitted interstate service at Love Field and used as descriptive modifiers of the term 'flight.' A contrary reading is grammatically strained and leads to unreasonable and incongruous results, as noted above.

Nor can we accept the arguments of the DFW Parties and Southwest that the CAB improperly modified the language of the Amendment by somehow reading into subclause (1) the words 'on a flight' that precede that subclause. Interestingly, in urging their own interpretation, the DFW Parties and Southwest engage in the same type of error they accuse the Board of having made. Strained modification of language is not necessary to understand the plain meaning of subsection (c); subclauses (1) and (2)

must be read together in the context of the entire sentence in which they appear.

All commenters, as well as this Department, believe the Amendment's legislative history supports their reading of the plain meaning of the provision. As discussed more fully below, we find that the legislative history, when reviewed as a whole, supports our interpretation of the Amendment. This finding is consistent with the views of Continental Airlines, America West, and the Department of Justice.

The DFW Parties and Southwest contend that the legislative history embodied in the Conference Committee Report supports their position that Congress intended to preclude from Love Field service carriers conducting any interlining elsewhere on their systems, citing the Conference Report at 24. These parties discount colloquy and statements on the floor of the House and Senate by members of the Conference Committee and floor managers of the legislation indicating that the Committee intended the interlining restrictions to apply only to Love Field service. They further suggest that the Amendment should be considered in the context of 'broader' history, noting that the provision of the 1978 Airline Deregulation Act defining services at satellite airports as an element of the public interest was amended to provide that this should be the case only where regional airport authorities and plans supported the use of such satellite airports. They point out that Congressman James Wright assumed this amendment of the Deregulation Act would prohibit the CAB from authorizing interstate service at Love Field. When the

Board subsequently authorized Love Field service, Congressman Wright introduced an amendment to the IATCA of 1979 that would have prohibited interstate service at Love. The House adopted this amendment, but the Senate version of IATCA included no comparable provision. While the DFW Parties and Southwest do not dispute that the current version of the Love Field Amendment was a compromise agreed to in conference, they nonetheless argue that Congress intended this provision to be very restrictive.

In our view, the legislative history, properly read, supports a less restrictive interpretation of the interline provision. The Conference Report begins by stating: 'Section 29 as approved by the conferees embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field.' Conference Report at 24. In addition, Congress clearly knew the extent of interlining practices among air carriers, since the Airline Deregulation Act and IATCA itself (specifically sections 11, 14 and 15) contain provisions involving agreements and fares;[7] and the Report is clear that usual ticketing, scheduling, and ratemaking practices

---

7 The DFW Parties and Southwest assert that the Amendment takes precedence over, and need not be harmonized with, IATCA and the earlier Deregulation Act. Even if this is so, it is not reasonable to assume that Congress would have adopted the Amendment with the purpose of granting a carrier (Southwest) a de facto monopoly position at Love Field after having enacted prior legislation with the primary purpose of placing greater reliance on competitive and market forces to protect the public interest.

would not be otherwise affected, beyond the specific Love Field restrictions. Conference Report at 26.

The Conference Report continues: 'Subsection c permits turnarous service between Love Field and points in the four contiguous states.' The turnaround nature of the authorized flights is repeated in the next paragraph. The DFW Parties' and Southwest's analysis of legislative history focuses almost entirely on the following paragraph. While those parties contend that that paragraph indicates that carriers who interline anywhere on their systems are barred from serving Love Field, the paragraph, in fact, is merely a repetition of the words of the Love Field Amendment. The Conference Committee more fully explained the meaning of that language in the next paragraph—an explanatory paragraph the DFW Parties and Southwest have apparently ignored. That paragraph begins: 'Thus, a carrier providing service from Love Field to a point in one of these states is not forbidden from providing service from that point to other points in other states beyond . . ..' The Conference Report continues: 'While it could not sell through tickets . . . between Love Field and points beyond the contiguous states, its usual ticketing, scheduling and ratemaking practices would not be otherwise affected.' Since Congress knew that these enumerated practices constituted interlining, it is not reasonable to argue that Congress intended to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate

service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and on-line restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a member of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. *Train v. Colorado Public Interest Group,* 426 U.S. 1, 14 (1976). The DFW Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: 'The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service . . ..' 126 Cong. Rec. H. 520 (February 4, 1980).

In a colloquy on the Senate floor, Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain

hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called 'double ticketing') at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. *See*, CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and its legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a

carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. *Id.* at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word 'offer' in the Amendment itself; although the legislative history refers to 'holding out.' In some contexts, the terms 'offer' and 'hold out' can be used interchangeably. *United States v. Contract Steel Carriers,* 350 U.S. 409 (1956); *Cf. Grajewski v. Commissioner,* 723 F2d 1062, (2d Cir. 1983).

'Through service' and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. *Cf. Tariff Flexibility Rulemaking* ER-1246, Order 81-81- 58 (November 10, 1981). *See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation),* Order 84-8-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[8] Through service

---

8 In the case of connecting flight service, the amount of the fare may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. *Cf. VUSA Investigation,* Order 84-8-55 at 27.

provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service conveniences associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's 'usual ticketing, scheduling and ratemaking practices would not be otherwise affected.' Conference Report at 26. Such 'other' practices may include double ticketing. *Cf. Interstate and Intrastate Fares in California Markets*, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a ticket or provide transportation. *Frissell v. Nichols*, 94 Fla. 403, 114 So. 431, 433 (1927); *Cf. Daitom, Inc. v. Pennwalt Corporation* 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from 'offering for sale . . . transportation to or from . . . any point which is

outside [the Love Field Service area]'; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under 'connections' service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that 'carriers may not hold out, offer or advertise Love Field service to or from points beyond the four contiguous states in any respect, including the publication of connecting flights schedules in airline guides, flight schedules, or similar media.' Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment. The phrase 'airline guides, flight schedules, or similar media' includes computer reservations systems. These systems were used at

the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules. Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. *See, e.g., Red Ball Transit Co. v. Marshall* 8 F.2d 321, 323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered as anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, *i.e.*, a single through ticket. This is different from the double-ticketing situation, discussed above, which involves two separate contracts of carriage. The Conference Committee Report states that '. . . a carrier could not . . . offer through fares between Love Field and points beyond the contiguous States . . .' Conference Report at 26. Therefore, a carrier cannot offer a constructed fare

for double-ticketed service originating or terminating at Love Field.

Throughout this discussion of marketing, we have used the term 'carrier' to include travel agents or other persons or methods used by the carrier to sell its tickets and services. Whenever an agent is acting for its principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small aircraft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term 'commuter airline' is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[9] Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

---

9 The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights from Love Field to 'points outside the State of Texas.' Subsection (c), however, states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, flights between Love Field and 'points within the State(s) of . . . Texas.' The Conference Report states that the 'provisions do not affect . . . intrastate service in Texas.' Conference Report at 25. Thus, we conclude that the Amendment does not apply to service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area mays provide intrastate service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love

Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket from an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list of advertise 'connecting' flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA-3-1029-G

BUDDY CRAMER, Plaintiff

v.

SAMUEL K. SKINNER, Secretary of Transportation, et al., Defendants.

[APRIL 11, 1990]

[Before A. Joe Fish, District Judge.]

MEMORANDUM ORDER

This case involves a challenge to the constitutionality of section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the "Love Field Amendment"). It is before the court on cross-motions for summary judgment brought by plaintiff, Buddy Cramer ("Cramer") and the defendants ("United States"). For the following reasons, the United States' motion is granted and Cramer's motion is denied.

I. *Background*

Originally, two commercial airports operated in the Dallas-Fort Worth Area: one was located in Fort Worth, the other at Love Field in Dallas. After much rivalry between the two cities over which should be the primary airport, it was agreed that a new airport ("DFW") would be built to serve both cities. The eight certificated airlines[1] then operating in Dallas and Fort Worth consented to move their operations to DFW.

When DFW opened in 1974, the certificated airlines fulfilled their promise to move to DFW. Southwest Airlines ("Southwest") however, opted to remain at Love Field and to continue its intrastate operations there. Dallas, Fort Worth, and the operator of DFW unsuccessfully attempted to exclude Southwest from Love Field. *See* City of Dallas, Texas v. Southwest Airlines Company, 371 F. Supp. 1015, 1019-20 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

After deregulation of the airline industry in 1978, Southwest applied for and received authorization from the Civil Aeronautics Board to establish a route from Love Field to New Orleans. In 1980, Congress enacted the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980). Section 29 of that act, the Love Field Amendment, restricts interstate airline service with

---

1 At that time, airlines providing interstate transportation on large aircraft were required to obtain a certificate from the Civil Aeronautics Board.

large aircraft to points outside Texas, New Mexico, Oklahoma, Arkansas and Louisiana.

On April 21, 1989, Cramer filed his complaint in this suit seeking declaratory and equitable relief. He asserts in that complaint that the Love Field Amendment is an unconstitutional burden and restraint on his right to travel interstate. On April 28, 1989, Cramer filed a first amended complaint additional allegations that the First Amendment and the Port Preference Clause (Art. I, § 9, cl. 6) of the United States Constitution had been violated. Cramer's second amended complaint, filed July 10, 1989, contained more detailed allegations but no new claims for relief.

On June 20, 1989, the United States filed its motion for dismissal, or in the alternative, for summary judgment. It contends that Cramer has no standing to challenge the Love Field Amendment, and that even if he did, the Love Field Amendment imposes only minimal restrictions on his right to travel. Cramer urges in a cross-motion for summary judgment that the Love Field Amendment is unconstitutional.

II. *Analysis*

A. *Standing: Injury*

This court is limited by Article III of the United States Constitution to the resolution of "cases" and "controversies." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). As a result, of this limitation, the Supreme Court has always required that a plaintiff have "standing" to challenge the validity of the action at issue. *Id.*

The requirements for standing are three-fold. First, a litigant must have "personally ... suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). Second t must be traceable to the challenged action. Third, the must be "likely to be redressed by a favorable decision (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)).

Cramer identifies injury to himself from two separate sources. First, he alleges that he has suffered economic harm[2] and inconvenience because of the restrictions placed on Love Field by the Love Field Amendment. Second, Cramer contends that he has been denied complete information on interstate travel by the Love Field Amendment's ban on advertising by travel agents. The United States does not dispute these contentions.

As to Cramer's claim that he is unable to obtain complete information from travel agents regarding interstate travel, the court is unpersuaded that Cramer has suffered the type of injury that would give him standing. Travel agents may give information regarding flights from Love Field upon request; however, they may not volunteer such information.

---

2 Cramer attributes this economic harm to the higher cost of transportation from his home to DFW as opposed to Love Field and to the unavailability of through fares, which he asserts would be less expensive that double tickets. *See* Cramer's memorandum of points and authorities in opposition to dismissal at 23.

Since Cramer knows that he is entitled to such information on request, he is not being denied any information he would receive if the Love Field Amendment were declared unconstitutional. Cramer cannot challenge the validity of the Love Field Amendment because it impairs the rights of other who do not know that they must request such information. Cramer has, however, shown economic injury to himself from the restrictions placed on his travel.

B. *Standing: Redressability*

The United States' sole contention regarding Cramer's standing is that the relief he seeks will not redress his alleged injuries. It asserts that the only way Cramer's injuries can be redressed is if a third party changes its conduct. Cramer, on the other hand, contends that it is likely that a third party will change its conduct if the Love Field Amendment is no longer in effect.[3] Cramer believes that Southwest, if permitted to do so, will sell through tickets and charge a single lower fare for connecting flights. He also believes that another carrier, America West Airlines ("America West"), will institute service at Love Field, based on a letter from America West's general attorney stating that America West is "seriously interested" in servicing Love Field.

In cases where the redressability of the plaintiff's injury depends on a change in the conduct of a third party, the Supreme Court has held that the plaintiff

---

3 *See* Cramer's memorandum of points and authorities in opposition to dismissal at 22, 23, 25.

must show that such a change in conduct is likely. *Simon, above,* 426 U.S. at 42-46; Allen v. Wright, 468 U.S. 737, 749, 758-59. *See also* Basiardanes v. City of Galveston, 682 F.2d 1203, 1211-12 (5th Cir. 1982). Cramer has attempted to make such a showing in this case, but the court finds it unconvincing. To find redressability in this case would require a degree of speculation unwarranted by Supreme Court precedent. Cramer has attempted to predict, without any firm basis, what Southwest would do in the absence of the Love Field Amendment. He has also provided the Letter from America West. He fails to address, however, that part of the letter in which America West's general attorney points out that the

> opening of a new station is a business decision that must be based upon the complete analysis of the needs of the marketplace and the availability of personnel and equipment necessary to provide such service as well as facilities at Love Field.

Although America West pledges to undertake such an analysis should the Love Field Amendment be declared unconstitutional, the letter makes no other commitment. In particular, it does not support the proposition that a change in service at Love Field is likely if this court grants the relief sought by Cramer.

III. *Conclusion*

Because the court has concluded, for the reasons stated, that Cramer has no standing to challenge the constitutionality of the Love Field Amendment, the United States' motion to dismiss or for summary

judgment is granted, while Cramer's motion for summary judgment must be denied.

SO ORDERED.

April 11, 1990.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

Supreme Court, U.S.
FILED
SEP 18 1991
OFFICE OF THE CLERK

(2)

No. 91-112

In the Supreme Court of the United States

OCTOBER TERM, 1991

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT V. ZENER
EDWARD T. SWAINE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48 (the Love Field Amendment), places certain restrictions on interstate air service involving Love Field Airport in Dallas, Texas. The question presented is whether the court of appeals erred in stating that the Amendment did not violate petitioner's constitutional rights to interstate travel and free speech or the Port Preference Clause, Art. I, § 9, Cl. 6.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Alabama Great S. R.R. v. *United States*, 340 U.S. 216 (1951)	9
Board of Trustees v. *Fo* 492 U.S. 469 (1989)	6-7, 8
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)	7, 8
City of Houston v. *Federal Aviation Admin.*, 679 F.2d 1184 (5th Cir. 1982)	6
Continental Air Lines, Inc. v. *Department of Transp.*, 843 F.2d 1444 (D.C. Cir. 1988)	2
Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)	5
Louisiana Public Service Comm'n v. *Texas & N.O.R.R.*, 284 U.S. 125 (1931)	9
Posadas de Puerto Rico Assocs. v. *Tourism Co.*, 478 U.S. 328 (1986)	7, 8
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	6
Switzerland Cheese Ass'n v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966)	5
Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)	6

Constitution and statutes:

U.S. Const.:	
Art. I, § 9, Cl. 6 (Port Preference Clause)	3, 6, 8
Amend. I	3, 6

Statutes—Continued: Page

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 2
International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35
§ 29, 94 Stat. 48 1-2
§ 29(a), 94 Stat. 48 3
§ 29(b), 94 Stat. 48 3
§ 29(c), 94 Stat. 48 3
28 U.S.C. 1291 5

Miscellaneous:

H.R. Conf. Rep. No. 716, 96th Cong., 1st Sess. (1979) 2
Love Field Amendment Proceeding, DOT Order 85-12-81 (Dec. 31, 1985) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-112

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. la-35a, is reported at 931 F.2d 1020. The opinion of the district court, Pet. App. 62a-68a, is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 9, 1991. The petition for a writ of certiorari was filed on July 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 48, known as the Love Field Amendment, places certain restrictions on interstate air travel involving Love Field, located near Dallas, Texas. Those restrictions, enacted following the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, were intended to provide "a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years," involving competition between the cities of Dallas and Fort Worth, by restricting interstate operations at Love Field and encouraging interstate travel at the Dallas-Fort Worth International Airport. See H.R. Conf. Rep. No. 716, 96th Cong., lst Sess. 24 (1979).

The Love Field Amendment prohibits airlines from offering single ticket interstate service to or from Love Field, except between Love Field and the four States contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico—the Love Field service area). Pub. L. No. 96-192, § 29, 94 Stat. 48. Passengers may travel between Love Field and points outside the Love Field service area by taking a second flight. Such travelers must buy a separate ticket for each leg of their journey, and cannot check their baggage through for the entire trip. Love Field Amendment Proceeding, DOT Order 85-12-81 (Dec. 31, 1985), petition for review denied, *Continental Air Lines, Inc.* v. *Department of Transp.*, 843 F.2d 1444 (D.C. Cir. 1988). Passengers may also obtain unrestricted interstate airline services at the Dallas-Fort Worth International Airport, located 18 miles from the center of Dallas and only 12 miles from Love Field. Pet. App. 4a. The Love Field Amendment does not restrict a limited monthly number of charter air flights to or from

Love Field, flights provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less, or persons providing interstate service from Love Field on November 1, 1979. Pub. L. No. 96-192, § 29 (a) and (c), 94 Stat. 48.

The Love Field Amendment also prohibits airlines and their agents from advertising or volunteering information on interstate services offered between Love Field and points outside the service area. Pub. L. No. 96-192, § 29(b), 94 Stat. 48; Love Field Amendment Proceeding, DOT Order 85-12-81 (Dec. 31, 1985). Airlines and their agents may, however, provide such information on a passenger's request.

2. Petitioner Buddy Cramer is an occasional airline passenger residing in Texas. On April 21, 1989, he filed a complaint in the United States District Court for the Northern District of Texas, seeking declaratory and equitable relief against those responsible for enforcing the Love Field Amendment.* Pet. App. 5a. As amended, his complaint asserts that the Love Field Amendment unconstitutionally burdens his right to travel interstate and violates the Port Preference Clause and the First Amendment. Pet. App. 64a.

The government moved to dismiss the complaint for lack of standing or, in the alternative, for summary judgment. Petitioner filed a cross-motion for summary judgment. The district court concluded that petitioner "has no standing to challenge the constitutionality of the Love Field Amendment." Pet.

---

* The complaint named as defendants Samuel K. Skinner, as Secretary of the Department of Transportation, the Department of Transportation, John V. Coleman, as Director of the Department's Office of Aviation Analysis, the Office of Aviation Analysis, and the United States of America. Pet. App. 5a.

App. 67a. Accordingly, it granted the government's motion and denied petitioner's. *Id.* at 67a-68a.

3. On petitioner's appeal, the court of appeals vacated the district court's judgment and remanded the case to the district court. The court of appeals "conclude[d] that the district court erred by dismissing [petitioner's] suit for lack of standing, but properly denied [petitioner's] cross-motion for summary judgment." Pet. App. 35a. In reaching the latter conclusion, the court rejected each of petitioner's constitutional objections on the merits. *Id.* at 20a-34a. Although the government briefed the merits of its motion for summary judgment, the court of appeals determined that it could not rule on that motion: "[W]e cannot order judgment on the merits for the Government because the Government did not cross-appeal from the district court's jurisdictional dismissal. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) (party who does not cross-appeal may not seek to enlarge his own rights or lessen those of his adversary)." Pet. App. 35a (citation omitted). Accordingly, the court of appeals vacated the district court's judgment and remanded the case to the district court with instructions to reconsider the government's motion for summary judgment and for further proceedings consistent with its opinion. *Ibid.*

ARGUMENT

1. The court of appeals' decision to remand the case to the district court suggests that petitioner's appeal of the merits of his claims is premature.

The court of appeals held that it lacked power to order summary judgment in the government's favor because the government "did not cross-appeal from the district court's jurisdictional dismissal," and the

award of summary judgment would enlarge its rights. Pet. App. 35a. Although petitioner did appeal the district court's denial of his cross-motion for summary judgment, *id.* at 20a, the court of appeals had no jurisdiction to review that decision because denials of summary judgment motions are not appealable. See *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966); cf. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (denial of class certification not appealable).

Although the court of appeals should not have gone on to review the district court's denial of petitioner's cross-motion for summary judgment (after it decided that petitioner had standing to pursue his constitutional claims), the court's mistake does not appear to have infected its judgment. The court correctly vacated the district court's "jurisdictional dismissal," and remanded the case to that court for consideration of the government's motion for summary judgment, Pet. App. 35a, just as it should have done if it had decided only that petitioner had standing. In the peculiar, interlocutory posture of this case, the Court should deny the petition for a writ of certiorari. If the district court awards summary judgment to the government, petitioner can perfect an appeal from a final decision under 28 U.S.C. 1291. If the district court refuses to rule summarily, and the case does not settle, the court can conduct a trial after which the loser can appeal on the basis of a full evidentiary record.

2. In any event, petitioner's three constitutional objections to the Love Field Amendment lack merit, and the court of appeals' dicta to that effect do not conflict with any decision of this Court or of any court of appeals.

a. Petitioner contends that the Love Field Amendment unconstitutionally infringes on his right to interstate travel. Pet. 10-14. Petitioner argues (Pet. 13) that the Love Field Amendment infringes on the right of interstate travel by "classify[ing]" persons as Love Field passengers or non-Love Field passengers and prohibiting the former class from boarding certain interstate flights, citing *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969).

This Court's decision in *Shapiro*, however, concerned a much more onerous burden on interstate travel than that imposed by the Love Field Amendment. *Shapiro* involved statutory provisions requiring a one-year waiting period for new State residents seeking welfare assistance. In contrast, the Love Field Amendment restricts interstate travel at one Texas airport but allows unrestricted travel to and from an airport a mere 12 miles away. Pet. App. 4a. Petitioner's argument "reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel." *City of Houston* v. *Federal Aviation Admin.*, 679 F.2d 1184, 1198 (5th Cir. 1982).

b. Petitioner also raises a facial challenge (Pet. 17-22) to the Love Field Amendment on the ground that the provision prohibiting "offers" by airlines and travel agents regarding interstate travel between Love Field and points outside the service area restricts speech in violation of the First Amendment. The court of appeals correctly concluded (Pet. App. 30a-31a) that because the speech at issue "propose[s] a commercial transaction," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), concerns a lawful activity, and is not misleading or fraudulent, it enjoys the limited First Amendment protection accorded commercial speech. See *Board of Trustees* v. *Fox*, 492 U.S. 469, 474-

475 (1989); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340 (1986).

Petitioner responds (Pet. 15-17) that restrictions on the speech he wants to hear must survive heightened scrutiny because it involves his right to interstate travel. But this Court's previous decisions have accorded such scrutiny only where the underlying conduct "could not have been prohibited by the State." *Posadas*, 478 U.S. at 345. Here, petitioner concedes that Congress could have "limit[ed] the number of operations," Pet. 22, or even closed Love Field altogether. Because petitioner's theory would extend heightened scrutiny to speech tangentially related to a claimed constitutional right, it would erase the distinction between commercial and fully protected speech and ignore this Court's insistence on maintaining the distinct treatment accorded the two. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 n.5 (1980); see, *e.g.*, *Board of Trustees*, 492 U.S. at 474-475.

Commercial speech may be restricted "if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas*, 478 U.S. at 340. Congress plainly has a substantial interest in resolving a regional dispute and thereby improving airline service for the Dallas-Fort Worth area. In *Central Hudson*, this Court held that a State's concern with fair and efficient electricity rates was a "clear and substantial governmental interest." 447 U.S. at 569. In *Central Hudson*, 447 U.S. at 568, and *Posadas*, 478 U.S. at 341, the government's interest in reducing demand—for electricity and for casino gambling by local residents, respectively—was held to be substantial. In this case, the government's interest in reduc-

ing demand for air travel at Love Field in order to promote the use of Dallas-Fort Worth Airport is similarly substantial.

Moreover, the restrictions at issue here directly advance the government's interest: the prohibition on advertising interstate service between Love Field and points beyond the service area may reasonably be expected to reduce the use of Love Field for such flights, and concomitantly increase the use of the Dallas-Fort Worth International Airport. See *Posadas*, 478 U.S. at 341-342; *Central Hudson*, 447 U.S. at 569.

Furthermore, a reasonable fit exists between the government's interest and the challenged restrictions. See *Board of Trustees*, 492 U.S. at 480. As the court of appeals observed, "[w]ithout the ban on advertising, more intrusive restrictions might be necessary to carry out Congress' decision to keep service at Love Field from undermining the agreement between Dallas and Fort Worth." Pet. App. 34a. Interested travelers may still ask any airline or travel agent for information regarding the implicated service. The fact that Congress might have chosen in the alternative to encourage or subsidize advertising designed to encourage use of the Dallas-Fort Worth International Airport does not impeach its reasonable judgment to prohibit certain Love Field advertising instead. See *Board of Trustees*, 492 U.S. at 479; *Posadas*, 478 U.S. at 344.

c. Finally, petitioner asserts (Pet. 22-29) that the Love Field Amendment violates the Port Preference Clause, which provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another." Art. I, § 9, Cl. 6. Petitioner argues that the Love Field Amendment

discriminates against ports in those States not within the Love Field service area.

The Port Preference Clause forbids preferences *between States* in respect of their ports or the entry or clearance of vessels, but "does not forbid such discrimination as between ports." *Alabama Great S. R.R.* v. *United States*, 340 U.S. 216, 229 (1951) (quoting *Louisiana Public Service Comm'n* v. *Texas & N.O.R.R.*, 284 U.S. 125, 131 (1931)). Congress may constitutionally act to benefit particular ports even if ports in the same or neighboring States are incidentally disadvantaged. *Ibid.* Congress has in this case acted to benefit the Dallas-Fort Worth International Airport, not to discriminate against States lying outside the Love Field service area. To the extent that the States abutting Texas are incidentally benefited by the Love Field Amendment, it is merely the "result of geography," *ibid.*, not the result of an unconstitutional congressional preference for the ports of those States in the Love Field service area. As the court of appeals noted (Pet. App. 28a n.14), petitioner has not demonstrated that Congress deliberately discriminated against the other 45 States by requiring that single ticket travel to or from them employ the Dallas-Fort Worth International Airport instead of Love Field.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT V. ZENER
EDWARD T. SWAINE
Attorneys

SEPTEMBER 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45088

Supreme Court, U.S.
FILED
OCT 4 1991
OFFICE OF THE CLERK

(3)

No. 91-112

In The Supreme Court of the United States

OCTOBER TERM, 1991

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

David J. Gallo
Counsel of Record
5910 North Central, Suite 1150
Dallas, Texas 75206
(214) 891-6628

6

In The Supreme Court Of The United States

OCTOBER TERM, 1991

No. 91-112

BUDDY CRAMER, PETITIONER

v.

SAMUEL K. SKINNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Respondents, the National Government, argue in their Brief for the Respondents in Opposition ("Resp. Br. Opp.") that the court of appeals "*had no jurisdiction*" to consider the constitutionality of the Wright Amendment, "because denials of summary judgment motions are not appealable." Resp. Br. Opp., at 5. (Emphasis added.) The National Government argues that, because the court of appeals "had no jurisdiction" to consider the constitutionality of the Wright Amendment, this Court should deny the

instant petition for a writ of certiorari (hereinafter the "Petition"). *Id.* The National Government does not appear to question the jurisdiction of the court of appeals over the appeal, itself, but instead asserts only that the court of appeals was without jurisdiction to address the merits of Petitioner's claims. (*Cf.: Ben Cooper, Inc.* v. *Insurance Company of Pennsylvania,* 924 F.2d 36, 38 (2d Cir. 1991), *certiorari denied,* 111 S.Ct. 425 (1991), in which Solicitor General Starr successfully argued that an interlocutory order "merged into the final judgment and thus became reviewable.")

Assuming, *arguendo,* the court of appeals exceeded its jurisdiction in declaring the Wright Amendment to be constitutional, it does not follow that this Court should deny the Petition. This Court may instead: (1) grant the writ sought by the Petition, (2) vacate the judgment of the court of appeals, and (3) remand this case to permit the court of appeals to address the jurisdictional issue. See, *e.g., Ben Cooper, Inc.* v. *Insurance Company of Pennsylvania,* 111 S.Ct. 425 (1990), *upon remand,* 924 F.2d 36 (2d Cir. 1991), *certiorari denied,* 111 S.Ct. 425 (1991) (in which this Court vacated the judgment of a court of appeals and remanded for consideration of a jurisdictional issue). Such disposition of the instant case would afford Petitioner an opportunity to have the merits of his claims adjudicated by a court of competent jurisdiction — an opportunity which the National Government freely admits Petitioner has not yet had.

If this Court were to deny the writ sought by the Petition, the National Government would undoubtedly argue in the courts below that both the district court,

and the court of appeals following remand, would be bound by the law of the case doctrine to adhere to the opinion of the court of appeals below (hereinafter the "May 9, 1991 Opinion") which, *inter alia*, declared the Wright Amendment to be constitutional. Various Fifth Circuit panels have differed as to whether they had power to reopen any issue following remand. See, *e.g., Drachenberg,* etc. v. *Canal Barge Company, Inc.*, et al., 621 F.2d 760, 762 (5th Cir. 1980), *rehearing denied,* 626 F.2d 172, *following remand,* 642 F.2d 823. (Court of appeals is "without power" to overrule the law of the case.) *Cf.: Lehrman* v. *Gulf Oil Corporation,* 500 F.2d 659, 662 n. 1 (5th Cir. 1974), *rehearing denied,* 503 F.2d 1403, *certiorari denied,* 420 U.S. 929 (1975). ("[I]t is within the[] power" of courts of appeals to reopen issues decided prior to remand.) The National Government's argument that relief by this Court is unnecessary because Petitioner may simply perfect an appeal from a final decision of the trial court (Resp. Br. Opp., at 5) fails to take into account the law of the case doctrine, and the reality that this Court is apparently Petitioner's only potential source of relief.[1]

Denial of the writ sought by the Petition would allow the National Government to continue to assert

---

1 Even the issue of the first panel's jurisdiction might be foreclosed in the court of appeals following remand. The National Government would argue that the May 9, 1991 Opinion contains an implied finding that the court of appeals had jurisdiction to declare the Wright Amendment constitutional. Several Fifth Circuit panels have held that implied findings are within the scope of the law of the case doctrine. See, *ex rel., Morrow, et al. v. Dillard,* etc., et al., 580 F.2d 1284, 1290 (5th Cir. 1978).

the May 9, 1991 Opinion for its *stare decisis* effect. The National Government currently relies heavily upon the May 9, 1991 Opinion in at least one other pending civil action in which the validity of the Wright Amendment is challenged. (State of Kansas, *et al.* v. United States of America, *et al.*, Civil Action No. 91-0233-TFH, in the United States District Court for the District of Columbia; nowhere in its briefing in said case does the National Government question the jurisdiction of the court of appeals to render all or part of its May 9, 1991 Opinion.) It would be most unfortunate if other federal courts were to defer to the May 9, 1991 Opinion, if in fact such opinion was rendered in the absence of jurisdiction.

If this Court is reluctant to grant the writ sought by the Petition because of what the National Government terms the "peculiar, interlocutory posture of this case" (Resp. Br. Opp., at 5), it does not necessarily follow that this Court need deny the Petition.[2] Instead, this Court may defer consideration of the Petition until the district court below and the court of appeals enter dispositive orders consistent with the May 9, 1991 Opinion, and permit Petitioner to file a supplemental appendix containing such orders.

---

2 Because the sole function remaining for the trial court is entry of judgment, and because reopening of issues following remand appears unlikely, Petitioner disputes the National Government's characterization of the judgment of the court ofappeals as "interlocutory". In the context of state court judgments, this Court has recognized that a judgment is "final" where "for one reason or another ... the outcome of further proceedings [is] preordained." *Cox Broadcasting Corporation*, et al., v. *Cohn*, 420 U.S. 469, 479 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted at this time. Alternatively, this Court may defer consideration of the Petition and permit Petitioner to file a supplemental appendix containing dispositive orders by the district court below and the court of appeals.

Respectfully submitted.

David J. Gallo
5910 North Central, Suite 1150
Dallas, Texas 75206
(214) 891-6628

October, 1991